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No. 177

Supreme Court, U.
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Supreme Court of the United States

OCTOBER TERM, 1919

STANDARD FASHION COMPANY
PETITIONER

v.

MAGRANE-HOUSTON COMPANY
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF ON BEHALF OF THE PETITIONER

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APPEAL PRINTING COMPANY, NEW YORK

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No. 177.

STANDARD FASHION COMPANY,
PETITIONER,

against

MAGRANE-HOUSTON COMPANY,
RESPONDENT.

BRIEF ON BEHALF OF PETITIONER.

Statement of the Case.

This case comes before this Court on a writ of certiorari to the Circuit Court of Appeals for the First Circuit.

The questions presented are the interpretation of Section 3 of the Clayton Act (38 Stat. 731) and its applicability to the contract between the petitioner (hereinafter called the plaintiff) and the respondent (hereinafter called the defendant), which was a pattern agency contract of the usual form (Rec., pp. 130-132).

The plaintiff is a New York corporation engaged in the manufacture and distribution of patterns known as Standard Patterns. The defendant had a store at the corner of Washington Street and Temple Place in the city of Boston at which it conducted a retail drygoods business. The plaintiff brought this bill in equity in the District Court for the District of Massachusetts to restrain the defendant from violating the clause of its contract

with the plaintiff (which then had nineteen and two-thirds months to run) by which the defendant agreed not to sell or permit to be sold on its premises during the term of the contract any other patterns than those made by the plaintiff. The bill also contained a prayer for such damages as might be ascertainable.

The defendant had admittedly broken the contract by ceasing to handle the plaintiff's patterns and by undertaking the sale in its store of the patterns made by the McCall Company, a competitor of the plaintiff. The only defense to the suit was that the contract, or the clause in question, is illegal and void under Section 3 of the Clayton Act, which reads as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

At the trial in the District Court before Johnson, Circuit Judge, there was no dispute about the facts

and no evidence that the contract in question tended in any way to lessen competition or create a monopoly. Judge Johnson dismissed the bill on the ground that the negative covenant by which the defendant agreed "not to sell or permit to be sold on the premises of the second party, during the term of the contract any other make of patterns" was illegal under Section 3 of the Clayton Act; and his opinion (pp. 9-17) shows that he regarded the contract as unlawful *on its face* notwithstanding the absence of any evidence of its actual or potential effect upon competition.

The case was argued twice before the Circuit Court of Appeals. After the first argument the Court filed a *per curiam* opinion (pp. 140-143) in which they declined to pass upon the applicability of the Clayton Act and affirmed the decree of the District Court "not for the reasons assigned in its opinion, but on the ground that the negative covenant, if valid and not prohibited by the Clayton Act, does not justify the interposition of the extraordinary powers of a court of equity to grant the special relief sought."

The plaintiff thereupon filed a petition for a rehearing (pp. 143-151) which was granted and the case was then reargued before Bingham and Anderson, Circuit Judges and Brown, District Judge.

The opinions thereafter filed (pp. 151 *et seq.*) show that the Court abandoned the position it had taken in the *per curiam* opinion and affirmed the decree of the District Court, the majority proceeding upon the ground that the negative covenant constituted a violation of the Clayton Act and was invalid upon its face. Upon this point Judge Brown dissented and his opinion presents a vigorous argument to the effect that the contract in suit was not shown to be invalid under the

Act; but he concurred in dismissing the bill, solely upon the ground that the plaintiff was not entitled to an injunction because the Court could not enforce specific performance of the entire contract.

The questions here presented are whether a contract like the one under consideration is unlawful upon its face or only when the evidence establishes that its effect may be to lessen competition or tend to create a monopoly; whether the contract is, indeed, one of "sale" at all, within the meaning of the Act, or a contract of agency or of joint adventure, to which the Act does not apply; and whether if it be a contract of sale the clause which limits the use of the defendant's premises without affecting its liberty of action elsewhere can possibly fall within the prohibition of the statute.

The decision of the Court below is erroneous for each of the following reasons:

1. Because the majority of the Circuit Court of Appeals, in declaring in effect that the negative covenant in this contract was invalid upon its face, in the absence of any evidence that it tended to lessen competition or to create a monopoly, completely disregarded the last clause of Section 3 of the Clayton Act and misconstrued the section as a whole.

2. Because the existence of similar negative covenants in nearly all of the contracts of the petitioner's competitors prevents the clause of the petitioner's contracts from having any tendency toward monopoly or toward the substantial lessening of competition.

3. Because the majority of the Circuit Court of Appeals erroneously determined the contract in question to be a contract of sale within the mean-

ing of Section 3 of the Clayton Act, whereas it is in substance, as the petitioner contends, an agency contract, or a contract of joint adventure not falling within the scope of this section of the Act.

4. Because in reaching said decision the Court below relied on statements in the reports of the committees of the two houses of Congress which were not addressed to the Clayton Act as passed and thereby were misled as to its applicability to the contract in suit.

5. Because the decision of the Court below did not involve questions of fact arising from conflicting evidence, but involved merely the erroneous conclusion that under Section 3 of the Clayton Act the petition's contract with the respondent was invalid upon its face, regardless of the proven and uncontradicted fact that it had no tendency to substantially lessen competition or create a monopoly.

FACTS.

I.

Preliminary Statement.

The facts all appeared by undisputed testimony.

The plaintiff is a New York corporation engaged in the business of manufacturing and selling patterns and distributing periodical publications illustrating the garments to be made from such patterns (pp. 24, 25). The patterns made by it have been sold since 1887 under the name of Standard Patterns throughout the United States and Canada and the name is a very valuable asset (p. 27). It sells it patterns direct to the consumer to a certain extent, but markets them in the main

through about 6,000 local agents, like the defendant, under contracts uniform with that involved in this case. Dry goods stores where piece goods and fabrics of that kind are sold make the most desirable agencies (p. 26), and the defendant's store by reason of its location in the precise centre of the shopping district of Boston and its favorable reputation "as a great piece goods store" affords a peculiarly valuable location for an agency (pp. 43, 44).

The plaintiff's patterns have been sold in Boston for at least 28 years through different agencies (pp. 27, 28).

The contract between the plaintiff and the defendant (Plaintiff's Exhibit 7, pp. 131-133) was entered into at the solicitation of the latter upon the expiration of a contract which the latter had had with the manufacturers of the Ladies' Home Journal patterns (pp. 29, 30). The plaintiff received no notice of termination from the defendant within thirty days after the expiration (on Nov. 25, 1916), of the first term of two years (p. 31), and consequently the contract was automatically extended for another term of two years and could not be lawfully terminated by either party until the expiration of three months after the end of such term, that is to say, until Feb. 25, 1919, (Op., C. C. A., pp. 151, 152).

The clause in the contract forbidding the defendant to handle on the premises in which the agency is conducted, other makes of patterns has been in the plaintiff's contracts for a great many years (p. 56) and in accordance with the general custom of the trade is found in nearly all the agency contracts of all the pattern manufacturers in the country (pp. 35, 36, 44, 45, 77, 78).

On July 9, 1917, the defendant broke the con-

tract by discontinuing altogether the sale of the plaintiff's patterns and the distribution of its advertising material and by installing in its store in place thereof the patterns and advertising material of the McCall Company, one of the plaintiff's competitors (p. 33; Op. D. J., p. 10). It appeared that several months before, to wit, on Feb. 2, 1917, the defendant had, without the plaintiff's knowledge, made a contract with the McCall Company whereby it was to become at an early date "special agent" at Boston for the sale of McCall patterns (Plaintiff's Exhibit 17, pp. 136-139).

At the time of the breach of contract the plaintiff had but one other agency in the retail district of Boston. That agency was in the store of R. H. White Co., and the contract with that company, entered into on Feb. 7, 1917 (p. 54), contained an agreement on the part of the plaintiff that it would not maintain any other agency within a quarter of a mile of the White store except that in the defendant's store (pp. 40, 76).

Having no adequate remedy at law because of the obvious impossibility of ascertaining the full amount of its damages, the plaintiff brought this suit in equity, relying on *Butterick Publishing Co.* v. *Fisher*, 203 Mass., 122, and similar cases, hereinafter cited. The defendant offered no justification in fact for its breach of contract and merely claimed that Section 3 of the Clayton Act invalidated the agreement.

The purpose of the suit was to maintain the plaintiff's right to continue to transact business in the same manner as it had done for many years.

II.

There is a complete absence of evidence that this contract or this form of contract has tended to lessen competition or to create a monopoly or might have such tendency.

The principal pattern manufacturing companies conducting a business similar to that of the plaintiff are the McCall., the New Idea Co., the Pictorial Co., the Butterick Publishing Co., the Home Co., the Peerless Co., and the May Manton Co. All of these concerns except the May Manton Co., market their products through local agencies in substantially the same way as does the plaintiff (p. 35). By the general custom of the trade substanially all pattern agency contracts contain a clause like that in the contract between the plaintiff and the defendant, to the effect that the agent shall not handle on the premises where the agency is conducted, the pattern of any other maker (pp. 35, 44, 45, 77). This custom has recently been given up by the McCall Co., whose new form of contract eliminates most of the agency features of the plaintiff's contract, but of the 12,000 agencies of that Company all but 300 to 400 are still acting under the old form of contract, which contains the clause in question (pp. 112-114). The representative of the McCall Co., who testified for the defendant could name no other company which has eliminated this clause from its contract (p. 114). There was undisputed evidence that very few stores in the country have handled two kinds of patterns at the same time (pp. 78,98).

No attempt was made by the defendant to show by evidence that the effect of the contract either

had been in the past or might be in the future "to substantially lessen competition or tend to create a monopoly," either in Boston or anywhere else.

On the contrary it appeared without contradiction that competition in the pattern business has grown continually more and more severe, that new pattern companies have been organized and have acquired a large trade, and that there are to-day many more companies in existence and doing a larger business than was the case 20 or 30 years ago. When the plaintiff began business in Boston some 28 years ago, the only other companies in the business were the Butterick Co., the Demorest Co., and the Imperial Co. (p. 40). The McCall Co., and the other large companies above referred to have been organized and started business since that time and several of them within recent years (p. 42).

The plaintiff has about 6,000 agencies in the United States, and, in round numbers, the Butterick has 10,000, the McCall Co. 12,000, the New Idea Co. 4,000, the Home Co. 5,000 to 6,000 and the Pictorial Co. 6,000 to 8,000. In all there are about 52,000 pattern agencies in the United States (pp. 42, 43, 106).

There was no evidence that any of the other pattern companies have ever had difficulty in establishing proper agencies in Boston. All of them except the Peerless Co. have at least one agency in the retail district of Boston within 750 feet of the defendant's store (pp. 40, 41, 90, 91). The McCall Co., for example, already had three other agencies in that territory before it succeeded in establishing another with the defendant by inducing it to break its contract with the plaintiff (pp. 41, 90). At the time of the breach of the contract the plain-

iff had only one other agency in the retail dry goods section of Boston (p. 42).

Instead of making monopolistic profits, the evidence showed that the plaintiff made no money at all during the last year before the trial of this case (p. 68).

Mr. Scanlon, the president of the plaintiff Company, testified without contradiction that it is not advisable and has not been the custom for a pattern company to seek a very large number of agencies in a small city or in any particular section of a large city, and he explained the reason why (p. 42). It is obvious that the obligation to take back unsold patterns sets a limit to the number of agencies which any manufacturer can profitably establish in a given locality (pp. 36, 37).

The actual conditions existing at the time of the defendant's breach of its contract with the plaintiff showed the futility of the contention that the contract with the defendant tended to monopoly. The available stores in the retail district were divided among the various competing companies, each store handling patterns of one manufacturer only, under agency contracts, and there was no evidence that any pattern company was having any difficulty in marketing its product or that its business was not effectively handled by its local representative (pp. 43, 45, 88). The plaintiff itself had definitely agreed with the R. H. White Co., with which under a contract made in February, 1917, it had established its other agency in Boston, that it would not maintain any other agency within a quarter of a mile of the White store except the one with the defendant, and the territory thus described includes the entire dry goods district of the city (pp. 40, 76). The pro-

prietors of all the other available stores had existing contracts with other pattern companies (pp. 44, 45, 80). Hence at that time as a matter of fact the clause in question in the defendant's contract cannot have had any tendency whatever toward the lessening of competition or the establishing of a monopoly in the pattern business in Boston.

The complete absence of any evidence indicating that the contract in question tended to lessen competition or create a monopoly was the principal reason for Judge Brown's dissent from the opinion of the majority of the court on the question of the Clayton Act, and for his conclusion that the decision gives no effect to the last clause of section 3 (pp. 157 *et seq.*).

The one piece of evidence relied on by Judge Johnson in the District Court and by Judge Anderson in the Circuit Court of Appeals as tending to show a monopolistic tendency on the part of this contract, is the admitted fact that the plaintiff Company is controlled by a certain holding company which also owns the stock of the Butterick Publishing Co., and the New Idea Co., and that the three companies between them have 20,000 agencies out of a total of 52,000 in the United States (p. 106).

The existence of this number of agencies is simply a condition co-existent with the presence in the agency contracts in the trade generally of the restrictive covenant, and neither the number, nor the distribution of the agencies among the plaintiff's competitors, is or can be the result or effect of the negative covenant either in plaintiff's contracts or those of its competitors, or of the contracts themselves.

It appeared that the officers of the three com-

panies, The Standard Fashion Company, The New Idea Pattern Company and The Butterick Publishing Company are different and that they are managed entirely as distinct concerns without any agreements among them (pp. 83, 84, 107, 108). There was no evidence that competition had been destroyed or lessened as between these three companies (p. 107) or that they had parcelled out the territory among themselves or had in any way sought to restrain trade or create a monopoly. Nothing whatever appeared except that they had common stockholders. Furthermore the relation between the three companies has existed for a great many years (p. 108), and there was no evidence whatever as to the number of agencies which the three companies had at the beginning of the period, or whether the number as compared with those of the other companies had increased or diminished during the period, or that the situation had been in the slightest degree affected by the exclusive feature of the agency contracts. On the contrary, the record shows that since the plaintiff commenced business every one of the 32,000 agencies of the companies other than these three had been established. During all of its 30 years of existence the plaintiff had succeeded in establishing but 6,000 agencies. The suggestion that its contracts tend to monopoly is made by the defendant in the interest of its new contract with the McCall Co., a concern which has come into being and has established some 12,000 agencies (pp. 40-43) in spite of the restrictive covenant in the contracts which the plaintiff has in the meanwhile been making with its much smaller number of agents.

In the face of the experience of 30 years it is

idle to contend that the plaintiff's contracts with its local dealers tended to lessen competition or to create a monopoly or that there is any likelihood of their having such tendency in the future.

It is indeed manifest that the very fact that the exclusive covenant exists in nearly all of the 46,000 agency contracts of the plaintiff's competitors, which is in accordance with the almost universal custom of the pattern trade, has prevented and must continue to prevent the acquisition of any monopoly by the plaintiff or any other company as no company can secure as a local agent any of the thousands of stores where the patterns of a competitor are sold under such a contract.

III.

The reason for the custom of restricting local dealers to one make of patterns and its advantages.

The plaintiff sells its patterns direct to the public to a considerable extent, partly at its sales rooms and partly by a very considerable mail order business. In the sales thus made direct to the public, the plaintiff does not undertake to impose any condition whatever on the purchasers (p. 39).

The custom of pattern manufacturers to stipulate with the local dealers handling their product that the latter should not sell on the premises, where the agency is conducted, during the term of the contract with one manufacturer, any other make of patterns, grew out of the peculiarities of the pattern business. Upon this point the plaintiff's president testified at the trial, and no attempt was made to contradict his testimony.

Patterns are a very perishable article. They are made in a great variety of styles of which a

considerable proportion changes very quickly. Of those made by the plaintiff some 1,200 different styles are current at the same time and about 60 new styles are produced each month. Each style is cut in different sizes, the number of which on the average is seven. Each local dealer should carry at least two sizes of nearly all the styles (p. 27). It follows that a large stock of one make of patterns necessarily occupies a given space and that dealers, having only a limited space which can be devoted to patterns, would have to devote substantially double the space to two makes of patterns that is required to handle one, since the supply cannot be restricted to one-half as many of each make as would naturally be carried of one make alone, without rendering the stock altogether inadequate as to each kind (p. 37).

The testimony showed that the custom of the pattern business by which local dealers or agents are resricted to one kind of pattern has subserved the interests not only of the parties to the contracts, but of the public as well. The plaintiff's president testified at some length upon this point (pp. 36-38) and he was not contradicted. The defendant called as one of its witnesses an expert (Rotheroe) auditor and assistant treasurer of the McCall Co., the beneficiary of the defendant's breach of contract in this case, and if the facts were not as stated by Mr. Scanlon, it is fair to assume that testimony in contradiction would have been elicited from this witness. As has been said, patterns are not articles of which the retailer may advantageously carry two stocks, as each stock must contain substantially all of the very numerous styles and the carrying of two kinds of patterns results in practically doubling the retailer's expense with reference to

patterns without increasing his sales. If the agencies are not exclusive in the sense referred to, the manufacturer must stand the additional cost incident to the necessary maintenance of more agencies and the obligation to take back more unsold patterns. The result of these conditions is that the public must pay the higher prices necessary to cover the increased expenses of manufacturer and dealer.

For example, in the ordinary town of 10,000 inhabitants there are 5 or 6 stores each of which handles a different kind of pattern. The evidence shows that the total amount of pattern business would not be increased if each of these 5 or 6 stores handled all the patterns made, but on the contrary there would be an enormous waste to the manufacturers and to the local dealers and a substantial increase in cost to the consumers, who must necessarily in the end pay the increased expense of transacting the business (pp. 45-46).

There was no evidence that anybody would benefit by the elimination of the exclusive feature from pattern agency contracts, or that its presence has worked hardship to anyone in the past.

IV.

The nature of the contract now before the Court—one of agency, or, if not of strict agency, of joint adventure.

The contract admittedly has some of the elements of sale, but the agency features so predominate as to determine the real nature of the contract. It establishes, as its language reads, "an Agency for the sale of Standard Patterns" (p. 130). *Its object is not to sell patterns to the local dealer, but to sell them through the local dealer to the public.* If they are not so sold the dealer *must* return

them and the manufacturer *must* take them back at the expiration of the contract. While the dealer gets an interest in the patterns, he does not get full title. The only use which he can make of the patterns is to sell them to the public or return them to the plaintiff. His rights are strictly limited also as to duration, for they cannot extend beyond the termination of the contract period. If the patterns have not then been sold they must be at once returned and his interest in them ceases. He is not a mere vendee but is an agent bound to promote the plaintiff's interests in various ways. His duties to the plaintiff are by no means fulfilled upon payment of the price stipulated to be paid for the patterns.

That the contract in the present case is in substance one of agency, broadly speaking, or at least of joint adventure in the sense that both the plaintiff and defendant are interested in the conduct of the business is plain from a consideration of its provisions. While it is true, that with the limitations above described the agent "purchases" the patterns, the plaintiff nevertheless retains an interest in them so long as they remain unsold in the possession of the agent. It is obliged to take back during two periods of each year, at 90 per cent. of the cost, such of them as are discarded, and to take back at the expiration of the contract, at 75 per cent. of the cost, all that remain unsold, and the agent agrees unconditionally to return all that are unsold. By virtue of these provisions the ultimate financial result to the parties cannot be determined until the termination of the relationship and the ascertainment of the value of the patterns remaining on hand, and throughout the entire contract period the two parties are mu-

tually interested in what is really a joint commercial enterprise. The relationship between them is obviously entirely different from that ordinarily existing between vendor and vendee.

The interest of the manufacturer in the development of the business, and particularly in having its patterns sold through the agent to the public, is safeguarded by the various provisions of the contract by which the agent obligates himself to promote the manufacurer's interests. Thus the agent agrees to buy a quantity of fashion sheets and handy catalogues annually for free distribution, to keep the pattern stock up to a certain minimum at all times, to "pay proper attention to the sale of Standard patterns" and to "conserve the best interests of the *agency* at all times" and to "re-order promptly all patterns as sold"; and he further agrees to "give the department a prominent position on the ground floor of the store" and not to remove the department "from its original location without the written consent of the manufacturer"; and to permit the manufacturer to "take account of the pattern stock whenever it desires"; and he agrees to return promptly at the expiration of the contract all patterns remaining unsold. Fifty per cent. of the purchase price of the original stock of patterns shipped to the agent remains unpaid as a "standing credit" throughout the period of the contract, and at the end of the period is not liquidated in cash, but by the return of the patterns remaining on hand. These features of the contract differentiate it from one of sale and give it the distinguishing characteristics of an agency or joint adventure.

It appears from the course of business between the parties and even from the allegations in the answer herein, that the defendant itself did not re-

gard the contract as one of absolute sale, or one in which the title to the patterns was vested in the defendant. When the defendant terminated the contract it returned the stock of patterns to the plaintiff (pp. 53, 54), and in the answer the patterns are treated as the plaintiff's patterns.

In the answer (p. 7) the transaction is inferentially described as an agency, for the defendant alleges that at the time the contract was made "the plaintiff had no *other agency* for the sale of its product among the immediate competitors of the defendant" (which the evidence shows was not the case) and again "that early in 1917, the plaintiff installed its product and opened an *agency* in the store of R. H. White Co., * * * which *agency* the plaintiff still maintains"; and on page 8 there is an expression "that the plaintiff by reason of its opening *another agency* in competition with the defendant."

ARGUMENT.

I.

The Circuit Court of Appeals put its decision entirely on the ground that the contract was invalid under Section 3 of the Clayton Act.

(a) The Court agreed with the plaintiff that at the time suit was commenced the contract had not been terminated.

The Court said:

> "The contract is dated November 25, 1914. Its first two-year term ran to November 25, 1916; failing the three months' notice within thirty days thereafter, the contract then ran until November 25, 1918. Then for thirty days there was another opportunity to give the three months' written notice of termination * * * We think the negative covenant (assuming for the moment it and the rest of the contract to be valid) is applicable to the entire life of the contract construed as to duration as we have indicated; that the contract shows a clear intention of the defendant to be bound for successive terms of two years, and for three months after notice of termination. We adopt, therefore, the construction put upon the contract by the court below. * * * The plaintiff consequently admits that its right to an injunction expired on February 25, 1919" (pp. 151, 152).

The suit was commenced July 25, 1917.

(b) The Court agreed with the plaintiff that it was entitled to an injunction when the suit was commenced unless the negative covenant was invalidated by Section 3 of the Clayton Act.

The Court said:

"Construing the contract as a whole, we do not think it can fairly be held so ambiguous as, if valid in all its provisions, to warrant the court in refusing the injunction prayed for" (p. 151).

(c) The Court was of opinion that the expiration of the contract during the pendency of the suit did not deprive the Court of jurisdiction to accord such relief as was proper.

The Court says:

"The plaintiff insists, and rightly, that the gist of the case is whether the Clayton Act invalidates its contract in whole or any part, and that the fact that its right to an injunction has expired *pendente lite*, does not relieve the court from the duty of determining the issues admittedly alive and involving substantial rights at the time of the argument of the appeal in this court" (p. 153).

"But the plaintiff insists that the fact that relief by injunction has now become inappropriate by reason of lapse of time does not warrant the court in refusing to retain jurisdiction in equity for the purpose of granting any appropriate relief, though it be only for the assessment of damages" (p. 152).

II.

The Court made no findings of fact. The case is not one where any controversy of fact is involved.

If the Court will refer to the opinion, hardly a statement of fact can be found. The only two statements of fact are found and appear in the following quotation from the opinion:

"In effect the plaintiff admits that the only way of escape from the condemnation of the

> statute is for the court to hold that this negative covenant may not 'substantially lessen competition or tend to create a monopoly.' * * * It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company, controlling it and two other pattern companies, control approximately two fifths" (pp. 155, 156).

The Court is in error. The plaintiff made no such admission, as an examination of the record will show. (See bottom of page 23.)

The court did not attempt to review the evidence but based its decision on pure conjectures and suppositions drawn from the face of the contract.

The second statement is immaterial. The number of agencies controlled by the holding company is *not* one of the effects of plaintiff's contracts.

III.

The Court reached the conclusion as to the effect of the Clayton Act by a misinterpretation of the limitation found in the proviso which makes invalid only those contracts "where the effect * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The Court said:

> "The language is 'may be,' not 'is' or 'will be.' In order to condemn the negative covenant, it is not necessary that the court should find that it *will* lessen competition or *will* tend to create a monopoly; it is enough to find that it *may* lessen competition or *may* tend to create a monopoly. * * * For present purposes, the fact that this section was amended in conference before final enactment we re-

> gard as of little or no significance. The reports of the two committees illuminate the evils and dangers in the trade situation with which Congress was undertaking to deal. As frequently happens, debate and conference modified the legislators' views as to the best method of dealing with the evils aimed at. But we find no abandonment of the main purpose expressed in these committee reports" (p. 156, 155. Italics ours.)

The House bill made every contract containing such a condition unlawful and provided for criminal punishment for making the same. The Senate rejected this and proposed to make only contracts of owners of patents containing such a condition invalid. The House refused to accede to the Senate bill and the bill went to conference. The conference rejected both the Senate and House bills and adopted the section in its present form with this proviso—"where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce"—and only in such case invalidated the contract. (See History, Appendix A *infra*, p. 87).

The foregoing clearly demonstrates that there was a change in the manner of effecting the purpose, as to which the Court said, "We find no abandonment of the main purpose expressed in these committee reports," and the Court therefore in following the reports was misled as to the meaning and effect of the Act as finally passed.

The Court treated the section as though the final proviso had not been inserted.

The opinion of Brown, J., dissenting as to the construction of the Clayton Act, very properly

said, "From the history of this clause of the Clayton Act to its final form it is quite evident that Congress rejected various drafts which would make a contract of this character void upon its face, and that the final clause was inserted to prevent the disturbance that might result to long established methods of business by an indiscriminate condemnation of a large body of existing contracts because of their verbal form, irrespective of their actual or probable effect" (p. 160).

IV.

The Court below was in error in holding that the contract was bad on its face without any evidence that it tended to substantially lessen competition or to create a monopoly within the meaning of the Clayton Act.

In the complete absence of evidence showing that the contract in question had or might have any substantial effect upon competition, the decision of Judge Johnson in the District Court and that of the majority of the Circuit Court of Appeals amounted to a ruling that the contract was illegal upon its face.

As Judge Brown pointed out in his opinion dissenting from the majority view (p. 200):

> "The statute does not create a presumption that such contracts are inherently vicious, nor does it impose upon the plaintiff the burden of proving that the contracts are not illegal. The presumption is of legality, and the burden is upon him who asserts illegality. The application of the statute should be made only upon

full proofs. The consequences of applying it otherwise are too serious to be disregarded."

The majority opinion on the other hand erroneously states the question as if the burden were on the plaintiff to prove that the contract might not restrain competition:

> "The plaintiff admits that the only way of escape from the condemnation of the statute is for the Court to hold that this negative covenant may not 'substantially lessen competition or tend to create a monopoly.' No such finding can be made" (p. 193).

The plaintiff made no such admission.

In the first place it contends that the contract is one of agency or joint adventure to which the statute has no application.

In the second place even if the contract is to be treated as one of sale within the meaning of the statute, the plaintiff denies that the burden of proof rests on it to establish its legality, but maintains that the question before the Court was whether the evidence justified an affirmative finding that the particular contract in question, under all the actual conditions existing at the time, tended to the suppression of competition or the creation of a monopoly within the meaning of the statute.

Full weight must, as Judge Brown says (p. 196), be given to the final clause of Section 3 of the Act:

> "From the history of this clause of the Clayton Act to its final form it is quite evident that Congress rejected various drafts which would make a contract of this character void upon its face, and that the final clause was inserted to prevent the disturbance that might result to long established methods of business by an indiscriminate condemnation of a large body of

existing contracts because of their verbal form, irrespective of their actual or probable effect, and in recognition of the fact that where there is an established monoply competition cannot be instituted or maintained unless the new competitor in the field can make a contract with someone to handle only its own goods and not to handle the goods of a company already dominating the field; that if such contracts were to be condemned irrespective of the trade in which they were made this might lead to effective suppression of competition, by enabling an established monoply to place its goods in the shop of every competitor" (pp. 198-199).

The language of this Court in the case of the *Duplex Printing Press Company* v. *Deering, et al.*, decided January 3, 1921, with reference to Section 20 of the Clayton Act is very illuminating in this case. The Court there said:

"* * * it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it. Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confine it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present or prospective. The extensive construction adopted by the majority of the Court below virtually ignores the effect of the qualifying words."

V.

The majority of the Court below misinterpreted Section 3 of the Clayton Act, and declared the provision in plaintiff's contract unlawful as a result of that misinterpretation.

The majority of the court below decided this case wholly upon the ground that the statute was intended to prohibit any restriction of the class mentioned which may possibly lessen competition or possibly tend to create a monopoly. It distinctly stated that it was not necessary that it should find that the contract or condition has lessened or will lessen competition or has tended to create a monopoly or will tend to create a monopoly, and said: "The language is 'may be' not 'is' or 'will be'" (p. 156), and "Restrictions of this sort that *may* substantially lessen competition or tend to create a monopoly are condemned as strongly in the final, as in the original draft" (p. 155). The difference between these "drafts" will be considered later.

It will be thus observed that the court has treated the words "where the effect * * * may be" as equivalent to the word "may" when defined as "possible." None of its other definitions are considered. The idea of actuality or substance which is conveyed in the word "substantially" and in the clause "in any line of commerce," is wholly eliminated for the Court said that the intent of Congress was to deal with "Competition, actual or potential" (p. 155).

It will be observed however that the decision rests exclusively upon the suppression of possible competition and possible monopoly, and that the idea

of actual existence or probable existence has been given no place whatever in the opinion.

The intent ascribed to Congress is not found in the act as passed, but is spelled from the reports of the Judiciary Committees of the House and Senate with regard to a section of the bill which was subsequently abandoned.

The interpretation thus placed upon the statute by the Court is erroneous for the reason that it gives *no effect whatever* to the proviso at the end of the section or to any word or phrase contained therein, and condemns the contract *on its face.*

That the majority of the court reached its conclusion as to the effect of Section 3 through a misinterpretation of the limitation or proviso "where the effect * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce," seems plain from the history of the legislation, from the circumstances under which the limitation was inserted, and from a consideration of the meaning of the words contained in the limitation.

The history of the legislation which resulted in the enactment of Section 3 is presented in Appendix A (*infra*, p. 87 *et seq.*).

From this history it appears that when the Clayton Bill was originally introduced in the House, it contained a Section numbered 4, which would have made criminal *the making* of a lease or sale of goods on the condition that the purchaser thereof shall not use or deal in the goods of a competitor of the lessor or seller (infra, p. 88). That section at the same time would have made *every* lease or contract of the kind described unlawful utterly regardless of whether the effect of the condition was to foster and develop competition and

to break down monopoly, or its affect was to lessen competition or to tend to create a monopoly.

When the House Committee introduced the bill, it presented a very elaborate report as to what it intended to do by Section 4, and how it expected to accomplish its purpose (*infra*, pp. 89, 90). The underlying scheme, so far as it affects the case at bar, was to make all contracts for sale upon condition that the purchaser shall not deal in the goods of a competitor of the seller, unlawful without regard to whether or not they interfered, unduly or otherwise, with competitive conditions. The majority of the Court below quoted very copiously from that report in its opinion (pp. 154, 155). The Court, we submit, was unduly influenced by these reports in interpreting the final limitation so as to make *all* such leases and sales or contracts for sales unlawful, *no matter what may have been their effect in the past, or what may be their probable or actual effect in the future.* But that Section never became a law.

When the bill went to the Senate, the Senate Committee on Judiciary eliminated the criminal features, and recommended the adoption of the section in an amended form, which it later withdrew in its entirety (*infra*, p. 92).

When the Senate Committee on Judiciary reported the bill, it also made an elaborate report in which it reiterated the language of the House Committee report as to Section 4. The Court below also quoted at length from the Senate Report (p. 154). The Committee made an explanation as to the purpose of Section 4, as recommended, which appears not to have been considered at all by the majority of the Court below. That explanation, as will be seen from the history (*infra*, p.

92), is that the Senate Committee rejected the House Section 4, because the Federal Trade Commission Act had been passed in the meantime, and the Federal Trade Commission had been authorized to deal with the subject matter of House Section 4. The Senate Committee in its report suggested it should be amended (*infra* p. 92). A comparison of the House Section with that recommended by the Senate Committee (*infra*, pp. 88, 92) shows that the substantial change made by the Senate Committee was to eliminate the criminal features of the bill. The obvious recommendation that should have been made in view of the enactment of the Federal Trade Commission Act was that the section be stricken out entirely. The realization of this appears to have dawned upon the Committee after its report had been printed and presented, for when the bill came on for consideration in the Senate, the Senate Committee recommended that Section 4 be entirely abandoned because the subject matter thereof had been more effectually and fairly dealt with in the Federal Trade Commission Act (*infra*, pp. 92, 93). The Senate accordingly struck out the section in its entirety.

It will thus be seen that the reports of the House and Senate Committees upon which the majority of the Court below placed such reliance were made with respect to a proposed section of the law which was finally rejected and abandoned by both Houses.

All that was quoted by the majority of the court below in its opinion was what was said by the Senate or House Committee with respect exclusively to the section of the bill that was rejected. The only report made by any committee with re-

which was radically changed, and not to the one adopted.

Section 3 as finally enacted (insofar as it is applicable to the contract in suit, if that be a contract of sale) makes unlawful a contract of sale on the condition that the purchaser shall not deal in the goods of a competitor of the seller *only* "where the effect * * * may be to substantially lessen competition or to tend to create a monopoly in any line of commerce."

The court below, unduly influenced by what it conceived to be the intent of Congress as evidenced by these committee reports which were not directed to the act as passed, construed Section 3 exactly the same as it would have been construed, if this final limitation were not inserted in the Act at all.

During the progress of the debates in Congress, it was pointed out time and time again that a provision that the purchaser shall not deal in the goods of a competitor of the seller was often as effective in preventing a monopoly as it was in creating it, and as often as conducive of competition as restrictive of competition. Many examples were cited, but the general principle was that where a field is fairly well covered by a monopoly, or a concern with large capital, there is only one way in which a new manufacturer can get into the field and that is to secure representation by which he can *keep* his goods on the market until the public have an opportunity to judge them on their merits, and that a monopoly or largely capitalized concern could avoid the act by consigning its goods, a plan not available to a smaller competitor. A small competitor can only accomplish that through a contract which insures

to him the exclusive sale of his goods in a particular place for a definite period. Unless the goods of a monopoly or highly capitalized concern are excluded from such place by valid contract, the monopolist or largely capitalized concern can drive out all competition by underselling the new competitor to the dealer, or by consigning his goods with an agreement that the dealer shall no longer handle the goods of the new competitor.

It is thus plain that the intent of the Conference Committee and of Congress was to make Section 3 as it was enacted apply only to those cases in which the result of the contract (the effect) was such as either seriously to threaten or actually to accomplish a substantial lessening of competition or an actual tendency toward monopoly, and that Congress intended where the result in the past has not been to substantially lessen competition or tend to create a monopoly, that such contracts shall not be within the condemnation of the act.

The majority of the learned court below it would seem was constrained to ignore that feature of the limitation in its endeavor to give to the section an interpretation consistent with what it supposed to be the intent of Congress as evidenced by these committee reports.

It must, of course, be assumed that Congress inserted the proviso for some purpose, and it must obviously be given full effect. The only reasonable meaning which it can have is that contracts of this character are to be declared unlawful only where they are shown to have some actual or reasonably probable effect upon competition, and not where such effect is merely *possible*.

If that proviso was intended to apply to such

contracts as may possibly tend to lessen competition or possibly tend to create a monopoly as the court below held (p. 156) that limitation was wholly superfluous. All contracts for sale of goods on condition that the purchaser shall not deal in the goods of a competitor have the possibility to tend to lessen competition or to create a monopoly.

It is submitted that the majority of the court below misinterpreted this proviso.

The court first took up the title to the act, then certain isolated extracts from the Report of the Senate Committee on the Judiciary; then certain isolated extracts from the Report of the House Committee on the Judiciary, and followed with the conclusion that they found no abandonment of the main purpose expressed in the Committee Reports (pp. 154, 155).

The court clearly stated what it conceived to be such "main purpose"—to deal with "Restrictions of this sort that may substantially lessen competition" etc. (p. 155)—although it is quite manifest that if Congress had so intended, it would have been much easier to have phrased the statute to read "where such contract for sale may substantially lessen competition", instead of "where the *effect* * * * may *be* to *substantially* lessen competition." The words "effect," "be" and "substantially" are given no meaning by the court below.

Having thus determined what it believed to be the legislative intent—to make unlawful every contract for sale with a "restriction of this sort that *may* substantially lessen competition"—the Court construed every word, phrase, clause and term of the section so as to square with such conceived intent, and gave no meaning whatever to

any word, phrase, clause or term which negatived such conceived intent.

The interpretation placed by the majority on Section 3, as enacted, turned upon the meaning of the words "may be" (p. 156).

The interpretation put by the court below on the words "may be" in the last clause of Section 3—"where the effect of such * * * contract for sale or such condition * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce"—seems to be quite wide of the mark at which the statute was aimed. The words "may be" are to be taken to relate to the future in the sense that they refer to a situation disclosed at the time the question of the effect of the contract arises. To say that the words "may be" refer to a conjectural or possible lessening of competition or tendency to create a monopoly which does not in fact exist, is to attempt to legislate for Congress and to ignore the obvious purpose of the legislation Congress actually enacted.

All things are possible to him that believeth. It requires a very dull imagination not to be able to conjecture a lessening of competition or a tendency to create a monopoly by any contract for the sale of goods. The number of contracts may be increased, the restriction may be more stringent and a host of circumstances which require no especially acute intelligence to imagine may bring about a lessening of competition or a tendency to create a monopoly at some possible time. To suppose that Congress was dealing with fancies of this description and that the courts were endowed with jurisdiction to give rein to their imaginations with respect to possible lessenings of competition

or tendencies to create monopolies, is to attempt to draw to the courts an authority which Congress never has conferred and never will confer on any body whatever.

Nor is the matter helped by disguising what is merely possible or conjectural with the cloak of the word "potential." What is "potential" lessening of competition? We suppose it may be said to be any lessening of competition that may be brought about, and again we are in the land of imagination and dreams. We do not think it worth while to discuss propositions so plainly at war with the statute. Congress used the words "may be" in the sense of futurity so that the act passed in 1914 would apply to transactions at a subsequent period, where at the time the effect of the transaction would be to substantially lessen competition or tend to create a monopoly.

The facts show that the effect of the contract in this case has not been and is not to lessen competition or to tend to create a monopoly and that in fact the effect is and has been to foster competition and to prevent a monopoly. The case is absolutely bare, so far as a lessening of competition or tendency to create a monopoly is concerned, of anything but conjecture and imaginings about possibilities. For a lessening of competition and tendency to create a monopoly could only result from a reversal of the experience of the past which is not either natural or to be expected.

A consideration of the provisions of Section 7 of the act will aid in construing Section 3. The first paragraph of Section 7 provides that no corporation shall acquire stock of another corporation "where the effect of such acquisition may be to substantially lessen competition" between the

two corporations "or tend to create a monoply of any line of commerce." The third paragraph of this section provides, "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or attempting to bring about, the substantial lessening of competition."

The plain intent of section 7 was to put the criterion, where the purchase was solely for investment, on the actual use made of the voting power acquired. Until and unless the voting power of the shares acquired is *"used"* to bring about, or to attempt to bring about, the substantial lessening of competition, the acquisition is not prohibited. Even if the voting power is used to lessen actual competition, the proviso still applies if the competition is not "substantially" lessened by the use of the voting power. Further it was not sufficient that the two corporations occupied competitive fields and were actually engaged in important competition. Nothing else can be meant by the proviso that the shares are not used "to bring about, or in attempting to bring about, the substantial lessening of competition." It would be difficult to suppose at any rate that competition that did not exist could be lessened. But certainly competition that does exist can be lessened, and substantially lessened; and hence there is no escape from the conclusion that the fact that such competition between the two corporations did exist was not to take the acquisition of the shares out of the proviso in case the shares were not used by voting or otherwise to bring about, or in attempting to bring about, the lessening of competition.

The proviso does not turn even on the absence of voting power, for if there is no voting power it

would be impossible to use the shares by voting to bring about the described result.

Congress was aiming at holding companies, and it had no desire to restrict investments which were not improperly used. Congress had some regard for enterprise and the success of business in this country. Congress was not legislating in a vacuum. It was asserting a control over vital currents of the country's trade. Congress drew the line at the abuse of the voting power and not even at the existence of actual and important competition.

The Clayton Act is to be construed as a whole and the same words when used in different parts of the act are to be given the same meaning if the context does not require otherwise.

Congress was not prepared to enact a statute condemning all contracts on condition that the goods of a competitor should not be dealt in. Congress had that sort of a statute under consideration, and declined to enact it. The statute it did enact took account of the rule of reason. Congress declined to fetter trade by conjectures and imaginings.

So far as Section 3 is concerned, the words "may be" are susceptible of two quite different meanings depending entirely upon which of the two words is accentuated. If the word "may" is emphasized, the words "*may* be" convey the concept of potentiality or possibility, without any relation whatever to atcual existence or being; but if the word "be" is emphasized, the words "may *be*" convey the concept of probability, existence and being. Accentuation on the first of the two words precludes any reasonable meaning being given to the word "be," which of itself implies

some kind of existence; while accentuation on the second does not destroy the real meaning of "may" and gives some significance to the word "be."

The Court said (p. 155): "Competition, actual or potential, was the object of Congressional solicitude."

There is nothing in the report of either the House or the Senate Committee regarding potential competition or potential monopoly. The only suggestion approaching such an idea is found in that part of the Senate Committee report stating "the theory of the bill" in which appears the clause "to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation." p. 154). Apparently the majority construed these words to mean "before creation" instead of "before consummation." Obviously the language refers to a situation actually created which is developing into a trust, conspiracy or monopoly, but which has not been consummated.

It is quite doubtful whether *potential* competition was the object of Congressional solicitude at all. It would appear that its solicitude concerned the suppression of *actual* competition, and in an attempt to correct the evil brought about through the abuse of so called "tying contracts," the Committee decided to abolish their use entirely. Be that as it may, the observation of the Court can be justified only when made concerning the bill in its discarded form. It cannot be justified as to the final enactment where the words "substantially lessen competition" are employed. "Potential" is the opposite of "actual." There can be no substantial lessening without an actual less-

ening. The presence of the word "substantially" in the statute precludes the idea of a potential lessening. To write the word "potential" into the statute is to create a contradiction of terms. To make the statute read, "Where the effect may be * * * to *potentially* substantially lessen competition," is to make it impossible of reasonable construction. A potential substantial lessening of competition is no more conceivable than a vacuum with something in it. The decision of the court was reached through the deletion of the word "substantially," for the Court said (p. 156):

> "In order to condemn the negative covenant, it is not necessary that the court should find that it will lessen competition or will tend to create a monopoly; it is enough that it may lessen competition or may tend to create a monopoly."

The court not alone eliminated "substantially," but it also eliminated the words, "in any line of commerce," which mean, if any meaning is to be given them, to some material degree.

In the Standard Dictionary, Twentieth Century Edition, (p. 577), "effect" is defined as "The result or product of some event, cause or agency; and consequences and outcome." It has also been the subject of judicial construction. It is defined in 14 *Cyc.* as "A result which follows a given act." Citing *Movench* v. *Young*, 16 Daly (N. Y.), 143, 144; and *Roberts* v. *Donnell*, 31 N. Y., 446, 449. Just how a contract could result in a potential lessening of competition, substantial or otherwise, or in the creation of a potential monopoly, is quite inconceivable.

Under the New York anti-trust statute in which the expression "may be" is found the words used

being "whereby a monopoly * * * *is or may be* created," or whereby "competition * * * *is* or *may be restrained*" (Section 340, General Business Law, McKinneys Consolidated Laws of New York, Book 19, p. 183), contracts like the one in suit have invariably been held not to violate the statute. The words "tend to lessen" competition are found in the South Carolina statute. These statutes and other with similar provisions will be examined later (*infra*, p. 71 *et seq.*).

None has been construed as the Court below construes them.

Relying upon the intent thus ascribed to the Committees by reason of the reports referred to, the majority placed the accentuation on the "may" and gave to the words "*may* be" the concept ot potentiality or possibility without relation to actual existence or being. The court construed the words to mean "may *by any possibility* be." Congress undoubtedly knew that the effect of some contracts may be and of others may *not* be to lessen competition or tend to create a monopoly. The history of the legislation which resulted in the final enactment demonstrates clearly that the intention of Congress was to give to each word its proper meaning, so that together they would be construed so as to place full value on the word "effect" and upon the phrases "substantially lessen competition" and "tend to create a monopoly."

In its effort to make its determination conform to the conceived legislative intent, the court failed to apply the rule that a statute in derogation of the common law must be strictly construed, and gave no effect to the distinctions to which its attention was directed, between a sale of goods unqualified by any condition except that the purchaser shall

not deal in the goods of a competitor of the seller, to which the statute applies, and a sale of an interest in goods limited in extent and duration, to which the statute, on its face, does not apply; between a condition that the purchaser shall not deal in the goods of a competitor of the seller, to which the statute applies, and a limitation of the use of particular premises, to which it does not apply; and the distinction between a prohibition affecting a "line of commerce", and a restriction affecting a particular store.

In the same manner the court, following the supposed intent of Congress, deemed it entirely unnecessary that the effect of the contract should be limited to the supposed benefit or detriment to *either of the parties to the contract*, but apparently was influenced in its decision not alone by the number of agencies which " a holding company controlling it" is supposed to have (p. 156) without a scintilla of evidence that the "holding company" had even a single agency, and seemed further influenced by the theoretical possibility that if the *plaintiff* could not acquire a monopoly, *"some other aggressive concern,* * * *, will shortly have almost, if not quite, all the pattern business"; and that to "limit to a single pattern maker the pattern business of dealers most resorted to" (of which the evidence is quite to the contrary) *"may tend* to facilitate further combinations" (p. 156). Such speculation is impotent in the face of the evidence in this case.

As is shown by the history of the legislation, the intent thus ascribed by the court to Congress, if it ever existed, was changed so far as the Clayton Act is concerned. Reliance upon the Reports of Committees addressed to such pro-

posed legislation, in interpreting a statute so as to invalidate 50,000 or more contracts, contrary to the express language of the statute is, we submit, reversible error.

The statute is not ambiguous, and there appears no need to refer to Committee reports to ascertain its intent or meaning; but if it were helpful that reports be resorted to, they should be those of the Conference Committee which dealt with Act as passed, and not those of the Judiciary Committees, which dealt with measures rejected. The Conference Reports show that the legislation proposed in Section 4 as proposed by the House and proposed to be amended by the Senate was radically changed as part of the Clayton Act, because the subject matter was more fairly and efficiently dealt with in the Federal Trade Commission Act, passed while the Clayton bill was pending (*Infra*, pp. 97, 99, 100).

The final scheme thus enacted was not intended to reach any tying contract, not unfair in its essence, which did not actually tend to substantially lessen competition through the several States or did not actually tend to create a monopoly in a line of commerce through the several States; "hypothetical or unreal" possibilities were not aimed at.

In this connection the comments of Judge Brown (p. 160) with respect to the history of the act are singularly applicable.

Under Section 3, as adopted, no lease, sale or contract for sale was made unlawful *per se*, and no lease, sale or contract for sale made unlawful independent of its effect.

VI.

The correct interpretation to be placed on Section 3 requires that due effect be given the last clause and that "a business contract be not upset upon hypothetical and unreal possibilities if it would be good upon the facts as they are."

We think the correct rule of interpretation is that employed by Judge Brown (pp. 157, 158) from which we excerpt the following passages:

> "Full weight must be given to the final clause of Section 3 of the Clayton Act:
>
> **" 'Where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce.'**
>
> "In determining the effect we must consider the thing upon which the effect is to be produced. This clause seems to require that the interpretation and application of Section 3 of the Clayton Act should be according to the principles stated in the opinion of Mr. Justice Brandeis in Chicago Board of Trade *v.* United State, 246 U. S., 231, 238; * * *
>
> "To predict the consequences of the defendant's agreement not to sell or permit to be sold on its premises, during the term of the contract, any other make of patterns, it is necessary to consider the peculiarities of the particular business to which the contract relates. We must also consider that the restraint is upon the use of the premises of the defendant for a limited period. See 251 Fed., 559, 560. It is evident that a restriction of this character did not constitute an inducement to the defendant to enter into the contract for carrying a stock of the plaintiff's goods."

And page 159:

> "A business contract, like a statute, is not to be upset 'upon hypothetical and unreal possibilities if it would be good upon the facts as they are.' *Pullman* v. *Knott*, 235 U. S., 23.
>
> "In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of 'possibility' arising in ignorance of facts which, if known, would destroy that feeling. It must be based on knowledge and upon a reasonable belief that, in view of existing facts, there is a 'dangerous probability.'
>
> "In the present case there is no evidence that any competitor of the plaintiff had ever been excluded from competition in the City of Boston or elsewhere because of inability to procure customers or a store in which he might market his goods. If the defendant desired to defend upon the ground that this contract, by reason of its effect upon the trade, was illegal, it was incumbent upon it to allege and prove such facts as would enable the Court to make a reasonable prediction of consequences. *Ford Motor Co.* v. *Benjamin E. Boone, Inc.*, 244 Fed., 335, 342. No such defense is made by the answer * * * (p. 160). I am of the opinion that this Court should not upon this record, and upon so incomplete a state of proofs, determine the invalidity of this contract * * * (p. 162). I can see no ground in the record for apprehension that anybody is likely to acquire a monopoly in the dress pattern business, in which, as the evidence shows, the competition is very active."

Under these principles the statute would not apply to the contract in suit because there was no evidence of tendency to restrain competition or to create a monopoly.

The statute is applicable only to such a transac-

tion as comes squarely within all its terms, and such as would constitute an absolute sale in the absence of the condition that the purchaser shall not deal in the goods of a competitor of the seller. It does not apply where the relation between the parties is other than that of mere vendor and vendee; nor where the sale is of an interest in the goods as distinguished from the sale of the goods themselves; nor where the risk of sale is substantially borne by the seller; nor where the seller's profit depends upon the sale by the dealer of the goods; nor where the parties have a joint interest in the goods; nor where the transaction is one of joint adventure; nor does it apply except where the condition of the sale is that the purchaser shall not deal in the goods of the competitor; nor where the restriction leaves the purchaser free to deal in competitor's goods in any place other than a particular store; nor where the lessening of competition, if any, is not substantial; nor where the tendency to lessen competition or to create a monopoly is merely possible; nor where the practical operation of the contract—the "effect" as it is termed in the statute—for a period of thirty years has not been to lessen competition, substantially or otherwise, or to create a monopoly incipient or otherwise. So assuming that the contract in suit is one of sale, within the meaning of the act, it is not within its condemnation.

VII.

Applying the rule to the case at bar it must appear that there is a reasonable probability that the effect may be to substantially lessen competition or tend to create a monopoly and it is not sufficient that there are "hypothetical and unreal possibilities" that the effect may be to substantially lessen competition or tend to create a monopoly.

The only facts appearing in evidence which could be claimed to bear in any way upon the question of monopoly were the facts concerning the ownership by the holding company of the shares of stock of the plaintiff, the Butterick Publishing Co., and the New Idea Co., and the fact that the three companies together have about 20,000 agents in the United States out of a total of 52,000 pattern agencies (p 106).

It is not claimed by the Court nor can it reasonably be claimed that the number of pattern agencies in existence, or the distribution of them among the plaintiff and its competitors is in any sense one of the results or effects of the plaintiff's contracts, or the condition therein that the defendant shall not sell or permit to be sold on its premises during the term of the contract any other make of patterns, or one of the effects of such contracts generally. Unless such is shown to have been one of the effects of the contract, the number of agencies and/or the distribution of them cannot be considered as facts in any way tending to prove that the effect of the contract is or may be to substantially lessen competition or to tend to create a monopoly. On the other hand the number and distribution of the agencies is testimony compe-

tent to prove and proves conclusively that such has not been the effect in the past.

But as has been pointed out, there was no evidence that this relationship between the companies, which has existed for nearly twenty years (p. 107), had restrained competition even as between themselves. On the contrary, it appeared that the business of the three companies has been and is carried on entirely separately and that there are no agreements between them (p. 83). There was no evidence that the ownership of the stock by the holding company has resulted, either with or without the aid of these exclusive agency contracts, in any suppression of competition or tended to create a monopoly, or that there *might* be any such result or tendency. On the contrary, it appeared that various new competing companies have been organized during this period and have acquired a large share of the business, that competition has grown more and more severe, and that the McCall Co., which induced the defendant to break its contract with the plaintiff is the largest company of all (pp. 40-43). In fact, as aganist the 20,000 agencies of the plaintiff and the Butterick Publishing Co., and the New Idea Co., the other competing companies have succeeded in securing 32,000. Legitimate business reasons for the existence of the exclusive clause in agency contracts are to be found in the nature of the patterns and the pattern business and were shown by evidence not contradicted. Yet Judge Johnson and the majority of the Court of Appeals struck down this particular contract, not by reference to any evidence of an illegal tendency, for there was none, but merely because of the holding company and speculative theories as to what might happen if certain imagined conditions

should arise whereas the true rule is thus stated by Judge Brown (p. 159):

> "In applying the statute it must be judicially determined what the effect may be. This judgment must be more than a mere feeling of 'possibility' arising in ignorance of facts which, if known, would destroy that feeling. It must be based on knowledge and upon a reasonable belief that, in view of existing facts, there is a 'dangerous probability.'"

The grounds of Judge Johnson's decision were thus stated by him (pp. 16, 17):

> "The contract by its terms destroys all competition in the sale of patterns and establishes a complete monopoly in the territory which it covers: a large retail dry goods store at the corner of Temple Place and Washington Street, in the centre of the dry goods district of a large city.
>
> * * * * * * *
>
> "If the plaintiff could make a contract like the one under consideration with all the proprietors of retail dry goods stores in this district, it would have a complete monopoly of the sale of patterns, in it, and there is nothing in the contract to prevent it doing this, or even covering the whole State of Massachusetts or the whole country. If there were but one dry goods store in a village and the plaintiff could make this contract with the proprietor of that store, it would secure a practical monoply of the pattern business in that village."

It thus appears that the decision is really based on the fact that by this contract the plaintiff established a monopoly in the defendant's store and that a complete monopoly would result *if* the plaintiff could make similar contracts with all other stores.

To the same effect is the conclusion stated by the

majority of the Circuit Court of Appeals as follows (p 156):

> "On this record we are constrained to find that this restriction may substantially lessen competition and may tend to create a monopoly. It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company, controlling it and two other pattern companies, control approximately two-fifths. The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business.
>
> "We must consider this restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under such restraint, as well as the nature of the restraint and its effect, actual or probable. Viewing it thus, in the light of the surrounding circumstances, we are constrained to agree with the District Court that the negative covenant in this contract may lessen competition or may tend to create a monopoly,—or both,—and is therefore obnoxious to the Clayton Act."

It does not appear what "facts peculiar to the business" were in the minds of the court, nor what is meant by "conditions already achieved under such restraint." Nothing appeared in evidence with reference to the character of the business except

the facts above referred to (pp. 18-20), which have made it of advantage to manufacturer, dealer and public that the dealer should handle only one make of patterns and which led to the almost universal custom of the business by which the dealer is so limited. As to the "conditions already achieved under such restraint," there was no evidence whatever, as has been pointed out, that this method of doing business has had any effect in lessening competition or preventing new companies from entering into the field or that it has caused any pattern company to have difficulty either in Boston or anywhere else in establishing a proper agency. All of the other pattern companies except the Butterick Publishing Co., have begun business since the plaintiff, and have established their thirty-two thousand agencies in the face of the plaintiff's exclusive contracts.

The suggestion in the majority opinion (p. 156) that there must be hundreds, perhaps thousands, of small communities in which such an absolute monopoly might be effected is purely fanciful, as it did not appear in the testimony that any pattern company has ever established or could possibly afford to establish an agency in any community so small as to have only one store. As there are, according to the census of 1910, over 132,000 cities, town and villages in the United States, it is obvious that not many of the plaintiff's 6,000 agencies are likely to be located in villages of only one store. It must be borne in mind, too, that in this case the question is not as to the validity of a contract with a dealer in a small town or of any other "hypothetical" agency contract that might be made *but as to the validity of this particular contract between the plaintiff and the defendant under the*

actual conditions existing in Boston and in the trade.

If it were a fact that the plaintiff had a contract with the only merchant in a community, with this negative covenant in it, and therefore a monopoly of the pattern business in that community, such fact would have no relevancy or bearing on the question as to whether this particular contract in Boston substantially lessened competition or tended to create a monoply.

It is submitted that Judge Johnson and the majority of the Court of Appeals did not proceed in accordance wtih the principles stated by Mr. Justice Brandeis in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238:

> "The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular

> remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

In the present case the courts below did not consider at all the uncontroverted facts revealed by the history of the business, with respect to the growth of new companies, the increase of competition and the absence of monopolistic profits under the regime of contracts like this; nor did they consider the reasons furnished by the nature of the business for the conclusion that these contracts are advantageous to all parties, including the public, and that self interest will preclude a manufacturer from seeking to monopolize the possible agents in a given locality. No consideration whatever was given to the actual conditions existing in Boston at the time of the making of this particular contract or at the time of its breach. Those conditions were such that obviously the contract between the plaintiff and the defendant *cannot* have had any effect upon competition. When the defendant broke its contract, the plaintiff had one other agency contract in Boston, that with the R. H. White Co., in which it had agreed that it would not establish any other agency within a quarter of a mile of the White store, except that with the defendant (pp. 39, 75). The territory thus delimited covers the "shopping district" of Boston (p. 39), and includes "everybody that competed in the trade" (p. 75). Wholly apart from this, any effort on the part of the plaintiff to take steps in the direction of monopolizing trade in Boston would have been met

at the outset with the obstacle that all the other available stores had existing contracts with other pattern companies (pp. 43, 45, 80).

It does not appear that there is any reasonable probability that the effect of the contract here may be to substantially lessen competition or tend to create a monopoly and it does appear as a fact that in the past its effect has been not to lessen competition or tend to create a monopoly but to foster competition and to prevent a monopoly.

From Mr. Scanlon's testimony it is plain that the effect of the negative covenant is rather to increase and encourage competition than to lessen it. Obviously, where each pattern company is represented in a community by a single agent who is bound to conserve the best interests of that particular manufacturer, competition will be keener than if each dealer handled one or more patterns. Mr. Scanlon explained in a town of 10,000 or less a stock containing two sizes was all that could be profitably maintained, and that only *one* agency could be profitably maintained in the town. If the demands of a community would warrant keeping a larger stock, it is evident that the public would be better served, more patterns sold and less returned, if the number of sizes in the stock were increased than if the dealer put in stocks of two or more different manufacturers. Since commercial possibilities limit the number of agencies in practically all the places in which an agency could be maintained at all, the establishment of one agency by a manufacturer frees all the other dealers to handle the patterns of competitors. Thus the actual effect of the restrictive covenant is exactly the opposite of what the Court held it *may* be.

The evidence shows that twelve pattern companies had agencies in Boston and its suburbs and that all the principal companies, except the Peerless, had one or more agencies in prominent stores in the retail district of Boston (91-93). There is no evidence whatever that any pattern manufacturer has ever had difficulty in establishing a proper agency in Boston, or, indeed, anywhere in the country, or that as a matter of fact there has *anywhere* been any lessening of competition or monopolization of the business.

The question presented upon this record is whether, because of the use of the word "may" in the last clause of Section 3, Congress intended the Courts to strike down any contract which might, in some imagined state of affairs, tend to monopoly, without any evidence that that state of affairs had ever existed or was likely to arise and without any consideration of the nature of the business, the purpose of the particular contract, its effect in the past and the reasonable probabilities as to its effect in the future.

Judge Brown in his dissenting opinion (p. 160) answers this question in the negative. It is submitted that the views expressed by him are sound.

VIII.

Assuming that plaintiff's contract is a contract for sale of goods within the meaning of Section 3 of the Clayton Act, it is not within the condemnation of the act because it is not made on condition that the purchaser thereof shall not deal in the goods of plaintiff's competitor.

The provision of the contract which was held to be in contravention of the Clayton Act is as follows (p. 130):

> "Second party also agrees * * * not to sell or permit to be sold on the premises of the second party, during the term of this contract, any other make of patterns. * * *"

The provision of the Act, so far as material, is a general provision, as follows:

> "Section 3.—That it shall be unlawful * * * to make a contract for sale of goods * * * for resale * * * on the condition * * * that the * * * purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller, where the effect may be," etc.

The premises are the defendant's store in the City of Boston (p. 130), at Washington Street and Temple Place (p. 131).

The contract does not contain a condition that the defendant shall not deal in the goods of competitors; the provision is that the second party (the defendant) shall not sell or permit the goods of competitors to be sold *in its store* during the term of the contract. This is not a prohibition of the sale of competitor's goods by the defendant, but

is simply a restriction upon the use of the defendant's premises for a limited time.

The provision, therefore, is not within the purview of the statute.

This distinction however was fully appreciated by the whole Court in the *per curiam* opinion, dated June 28, 1918, by Dodge, Bingham & Brown, JJ., for the opinion states (p. 140):

> "While the covenant forbids the defendant 'to sell or permit to be sold' on its premises, patterns other than the plaintiff's, it does not prevent the defendant from selling elsewhere."

That the court below understood that the clause in the plaintiff's contract was a restriction against the use of the defendant's premises and not a prohibition against the defendant selling the goods of competitors, would appear from the fact that nowhere throughout the second opinion, except in quotations from the act itself, is there any reference to the prohibition in the statute against the sale of competitor's goods, but invariably the covenant in the contract is referred to as a "restriction" (pp. 153, once; 155, once; 156, three times) and when not referred to as a restriction, it is referred to as a "negative covenant" or a "restraint."

After the reargument the opinion of the majority in holding the contract invalid under the Clayton Act apparently gave no weight to this distinction, but Judge Brown, dissenting from the majority, held that this distinction should be borne in mind in determining whether the Clayton Act was applicable or not, for he said (p. 158).

> "We must also consider that the restraint is upon the use of the premises of the defendant for a limited period. See 251 Fed., 559, 560."

This had reference to the prior decision.

That it was the intention of Congress to make this distinction between a restriction upon the purchaser dealing in the goods of competitors and a general prohibition against the handling of goods of competitors appears from the amendments made in the several bills in the course of their presentation to the Senate and House of Representatives. (See History, *infra*, p. 94.)

The restriction in plaintiff's contract is in the nature of a restriction in the lease of the premises of the defendant for the purpose of exhibiting and selling to the public the plaintiff's patterns and goes no further.

The defendant, without breaking the contract, could sell the patterns of competitors just across the street or anywhere else except upon the premises mentioned in the contract.

This is certainly not a condition that the defendant "shall not use or deal in" the patterns of plaintiff's competitors.

IX.

The contract in this case is not within the Clayton Act and is a contract of agency or, if not one of strict agency, one of joint adventure in which each party has an interest in the conduct of the business and the restrictive provisions in it are regulatory of the business to be conducted under it and necessary for the protection of both parties.

If the object of the contract was in substance to establish a local agency for the sale of the plaintiff's product, section 3 of the statute has no application. This is conceded by every one.

The reports of the judiciary committee on the Clayton Bill, above referred to support this view. (See History, *infra*, pp. 89, 90.)

In fact, the House expressly refused to incorporate in the House section a provision which would make Section 4 apply to the appointment of agents for the sale of goods. (See History, *infra*, p. 91.)

From these reports, which had reference to the section in its earlier forms, it is obvious that Congress was aiming at contracts of a different nature from the present. The kind of contract which it meant to make criminal were contracts of sale under which the vendee acquired the absolute ownership of the goods sold and was in no sense the local agent of the manufacturer. If this was the intention of Congress with reference to the original bill it is plain that the milder provision actually enacted was not intended to have a broader application.

It is submitted that the contract in question created a local agency for the sale of the plaintiff's product and that in spite of the fact that a limited interest in the patterns passed to the agent the contract was not one of sale within the meaning of section 3. The contract is in substance one for the rendering of service to the plaintiff, not for the sale of goods to the defendant. The only use which the defendant could make of the patterns was to sell them to the public or return them to the plaintiff. The defendant was subjected to the control of the plaintiff, so far as the pattern business was concerned, in a variety of ways. Thus it was bound to give the pattern department a prominent position on the ground floor of its store and not to remove the department from its original loca-

tion. It was further bound to purchase for free distribution specified quantities of the plaintiff's advertising publications, to pay proper attentions to the sale of the patterns, to reorder all patterns that were sold, to conserve the best interests of the agency at all times, not to sell the patterns except at label prices and to permit the plaintiff's representative to take account of the stock whenever it desired. Twice a year the defendant had the privilege of returning discarded patterns at nine-tenths of their cost and upon the termination of the agreement it was bound to return all patterns remaining on hand for which it was to receive credit at three-fourths of their cost. All these provisions, coupled with the provision with reference to the "standing credit" to be maintained throughout the period of the contract, show that the contract was intended in good faith to create a local agency for the sale of the plaintiff's patterns and that it is not in any sense properly described as a "contract for sale of goods" within section 3.

The agreement not to handle other kinds of patterns was required of the defendant, not as a condition of the sale of goods to it, but as a condition of its appointment as one of the plaintiff's local respresentatives. It was a condition under which the plaintiff kept a stock of $1000. worth of patterns in the defendant's hands at all times during the continuance of the contract and took them back at its termination. Without entering into the contract at all it could have bought from the plaintiff all the patterns it wanted and the purchases would have been subject to no conditions whatever.

That the present contract is one of agency (as it was held to be in *Weiboldt* v. *Standard Fashion*

Co., 80 Ill., App. 67) would seem to be conclusively established by the decision in *Willcox & Gibbs Sewing Machine Co.* v. *Ewing*, 141 U. S., 647. Judge Brown recognized the authority of this decision and refers to the "long established trade usage of describing such contracts as agency contracts irrespective of the fact that the title to the goods may pass from vendor to vendee" (p. 161).

While the majority opinion stated that the present case is "easily distinguishable from the Wilcox & Gibbs case" (p. 152), no intimation is given as to the grounds of the distinction. Judge Anderson merely proceeds to say:

> "Full title passed from the plaintiff to the defendant. The defendant was selling its own goods to its own customers; it was not, under delegated authority, selling plaintiff's goods to the plaintiff's customers."

Without pausing to criticise the use of the expression "full title" as applied to the patterns in this case, it is enough to say that Judge Anderson's language fits exactly the situation which existed in the Willcox & Gibbs case, and there seems to be no material difference between that case and this. The contract there provided that the manufacturer would "sell" its sewing machines to the dealer; that if the connection should cease the manufacturer should "have the right to *buy* back of its goods *sold* to" the dealer such as it might select; and that the dealer should "purchase" from the manufacturer a certain amount of goods until 1875. A more absolute title thus passed to the dealer than in the present case, for there was imposed upon the manufacturer no such obligation as exists here to take back its unsold goods at the termination of the

agency, yet the court held that Ewing was "strictly" an agent of the company.

With minor changes the contract between the plaintiff and the defendant could have been so worded as to reserve in the plaintiff the entire title until the sale of the patterns by the defendant instead of a reversionary interest contingent upon the failure of the defendant to sell the patterns. In that event the effect of the contract upon competition would have been identical with its effect in its present form, yet admittedly it would not have fallen within the Act. It cannot be assumed that Congress intended to make this immaterial feature the test and stamp the one form of contract with disapproval and not the other.

If a contract between a pattern manufacturer and a dealer, or a similar contract in any other branch of trade, establishes what is in effect a bona fide local agency for the sale of the manufacturer's product, it is wholly legitimate for the agent to agree not to handle competing goods, and the validity of the transaction under the Clayton Act cannot turn on the chance incident that, technically, a qualified title to the goods, limited both in extent and duration, is vested in the agent.

The contract in the Wilcox & Gibbs case very much resembles that in the case at bar except that the principal there did not have the direct interest in the business of the agent under the contract that it has here. The Wilcox & Gibbs Company had appointed Ewing its "exclusive vendor" for its sewing machines in a certain territory and had agreed, among other things, to "sell" him its sewing machines at sixty per cent. discount from its retail price list. It was also agreed that

at the termination of the contract the Wilcox & Gibbs Company should have the right to "buy" back such of the machines as it should select. There were various other provisions similar to those in the contract in this case, but the case was not as strong as this case—the Willcox & Gibbs Company was not bound to take back any of the unsold goods, and if taken back they would presumably be saleable, while in the case at bar the patterns when taken back can only be used as waste paper (p. 28). The question before the Court in the Wilcox & Gibbs case was whether the contract was one of agency which the principal could terminate or a contract of sale as was contended by Ewing. It was held that Ewing was an agent. On this point the Court said:

> "There was some discussion at the bar as to whether Ewing was, strictly, an agent of the Company. We think he was. He was none the less an agent because of his appointment as 'exclusive vendor' of the defendant's machines within a particular territory, or because of the peculiar privileges granted to or the peculiar restrictions imposed upon him. * * * The agreement constituted him the sole agent of the company for the sale of its machines within a certain territory. It is true that the machines he undertook to sell were to be purchased by him from the company at a large discount. But he could not sell them by retail below the regular retail prices. This arrangement was the mode adopted to protect the company's interests, and to secure the plaintiff such compensation for his services as would induce him to devote his time, attention and abilities to the company's interest. He was still a mere agent to sell such machines as might be delivered to him under the contract.'

If the Wilcox arrangement was an agency con-

tract as distinguished from a contract of sale there can be no question that the contract in this case is an agency contract. There are important differences, however, between the two contracts for the purposes of the application of the Clayton Act. In that case the principal assumed no responsibility for the sale of its sewing machines by the agent and had no direct interest in the results of the agent's business under the contract except as it might result in the sale by it *to* the agent of more sewing machines. In this case the plaintiff assumes practically all of the risks of the business to be conducted under the agency by its agreement to take back at ninety per cent. from time to time, during the term of the contract, practically all patterns which the agent has had on hand for six months and has been unable to sell and to replace them with other and up to date patterns at a nominal cost to the agent, and by the obligation which it assumes to take back at the end of the term of the agency all patterns on hand and unsold and to return to the agent seventy-five per cent. of their net value. The plaintiff not only agreed to so take back the patterns remaining on hand at the close of the agency, but the defendant is positively required to return them. By these provisions it is obvious that the major part at least of the risks of the business under the contract is assumed by the plaintiff.

It will be found that every restriction which is imposed upon the defendant by the terms of the contract is one which has direct relation to the protection of the plaintiff against the liability which it assumes under the contract or to the protection of the joint interests of the defendant and plaintiff in the business which is conducted under the contract.

That the passing of the title to the goods which the agent is to sell is not the test of agency is conclusively established by the *Wilcox & Gibbs Sewing Machine Company* case, though the courts below apparently regarded it as the only test.

In the present case it will be noted while a limited interest passes to the agent in the so-called sales which are made under the agreement, it passes for the purposes of the agency only, and the agent can do nothing with the patterns without violating the terms of the agreement except to place them in the location specified in the agreement and offer them for sale to the public upon the terms prescribed in the agreement, or return them to the plaintiff in case they are not sold.

The business for which the agency is created is *selling patterns* and it is of no consequence whether the title to the patterns to be sold passes preliminarily to the agent for the purposes of the business so long as the responsibility for the success of the business is divided between the parties and a fair share of its hazards is assumed by the principal. So in this case it is the responsibility of the plaintiff for the sale of the patterns which follows the patterns in the hands of the defendant and the liability it assumes to take back all which the agent fails to sell, and the other direct obligations it assumes to promote the sale of the patterns in the hands of the agent which gives it the right to impose conditions and to agree with the agent upon the manner in which the business shall be conducted. This is the distinguishing characteristic of both agency and joint adventure.

An illustrative case in the State courts to the same effect is *Staroske* v. *Pulitzer Publishing Co.*,

235 Mo., 67. In that case it was held that "a contract between a newspaper publisher and a carrier whereby the latter is given a route for the delivery of the newspaper to subscribers, with the privilege of purchasing copies of the newspaper for a specific price and selling the same at the subscription price, creates the relation of principal and agent."

See also

Pictorial Review Co. v. *Curtis Publishing Co.*, 255 Fed., 206.

The majority of the Circuit Court of Appeals held that the contract in question was not one of agency, and Judge Anderson suggested as the conclusive test (p. 152) the fact that obviously the Standard Fashion Company could not be held liable in tort for misrepresentation made by the Magrane Houston Company to a customer with respect to the quality of the patterns. The application of this test would have required a contrary decision by this Court in the Wilcox & Gibbs case. It may be conceded that in making a sale of a pattern to a customer the defendant was dealing with an article to which it had a qualified title and which it had an absolute right to sell whether the plaintiff desired the sale to be made or not, and that in making the sale it was not, speaking technically, the plaintiff's agent. On the other hand, the contract *did* create an agency of the kind which was held to exist in the Wilcox & Gibbs case and the relation of the parties was obviously entirely different than that of vendor and vendee.

In support of the proposition that the contract in question was one of sale and not an agency contract, Judge Anderson cites certain decisions and text writers, but it appears that none of the

authorities referred to have any real relevancy. It is not worth while to discuss them here in detail. They are summarized in Appendix B under subdivision I (*infra*, p. 102)). Attention may, however, be called at this time to the fact that the very first case cited, *Ford Motor Company* v. *Union Motor Sales Company*, 244 Fed., 156, in no way supports Judge Anderson's conclusion. In that case the Court said at page 158 with reference to the Ford Company's form of contract:

> "The plaintiff is under no obligation to take back any of the goods purchased by the dealer and it is expressly stated that the dealer licensee is in no way the legal representative or agent of the manufacturer licensor."

In the case at bar the plaintiff *was* under obligation to take back all patterns not sold by the dealer, and it is expressly stated in the agreement that the dealer is *the special agent of the plaintiff for the sale of the patterns.*

X.

The decisions of the Courts below give an effect to Section 3 of the Clayton Act which in view of the state of the law at the time of its passage Congress cannot have intended.

Before the passage of the Clayton Act contracts of this character were frequently assailed as being in restraint of trade either at ,common law or under the Sherman Act or state anti-monopoly statutes, and the view taken by the courts with practical unanimity was that they did not restrain trade. Congress knew that this had been

the generally accepted judicial opinion, and consequently there was an effort originally to enact legislation that would have made all such contracts illegal on their face. By adding the last clause of the section Congress declared that the contracts should not be bad on their face, but should be condemned only if they had a tendency toward substantial restraint of competition or monopoly. Decisions prior to the statute that *prima facie* no such effect is to be attributed to such contracts are clearly persuasive as showing that in cases under the Act there must be some substantial affirmative evidence to justify condemnation of any particular contract.

The statute must be construed in the light of common law principles and in so far as it may be found to be in derogation of the common law it must be strictly construed. The cardinal principle of the common law rule is the question of the reasonableness of the restraint which necessarily involves the question whether there was anything in the nature of the transaction or in the relationship between the parties in a particular case to make the restraint a reasonable one. In the case of a transaction involving the sale of merchandise and no relationship between the parties except that of vendor and vendee it would be difficult to find any reason for a condition prohibiting the vendee from dealing in the goods of a competitor except a purpose on the part of the vendor to avoid competition, and this is not a reason which has ever been favored by the law. On the other hand if the nature of the transaction and the relationship of the parties under it are such as to make the restriction a reasonable and proper one for the protection of an interest which

the vendor retains in the transaction it is one which the law has always favored and protected.

Construing the statute in the light of these principles we submit that there can be no question that it was not intended to apply to such contracts or transactions as those involved in the case at bar.

In *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S., 165, the court had under consideration a so-called profit-sharing scheme of the Corn Products Co. by which the Company agreed to give to its customers a stipulated percentage upon the amount of the purchases made in one year, to be paid at the end of the following year provided that during such time they made all their purchases of glucose and grape sugar from the Company. The alleged illegality of a contract to this effect which the Corn Products Co. had made with the defendant was set up by the latter in defense of the action by the Corn Products Co. to recover the price of certain glucose sold the defendant. It appeared that the Corn Products Co. was a combination composed of all the manufacturers of glucose in the United States. In delivering the unanimous opinion of the court Chief Justice White said (pp. 172-173):

> "The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year and a clause to the effect that the goods were bought by the Manufacturing company for its own use and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions."

In *Cole Motor Car Co.* v. *Hurst*, 228 Fed., 280,

284 (C. C. A., 5th Circ.), the court held that a contract between a manufacturer of motor cars and a dealer was valid under the Sherman Act and under the anti-trust law of Texas, saying:

> "He [the dealer] was given the privilege of selling in certain counties, and no others, and he was restricted from selling the cars of other motor car companies in the same counties; but this method is an ordinary instrumentality by which manufacturers and others display and dispose of their goods and commodities, and make sure of payment, if they can. It is not restrictive of trade in any sense. Insurance companies, and many other occupations and trades, parcel out their territory to different agents, and make similar arrangements. That it could not defeat competition is obvious to the court. There are a multitude of other companies from whom purchasers can readily obtain motor cars, varying in little, if anything, from the perfectibility of the car made by the plaintiff company. It is common knowledge that most, if not all, of such motor companies avail themselves of similar arrangements * * * There surely then has been no restraint of this trade."

When the case came before the court a second time Batts, Circuit Judge, who had not participated in the former decision said (p. 832):

> "The part [of the contract] which was claimed to be obnoxious to the Texas law appears to be a reasonable provision, almost essential to efficient marketing of the company's products."

Tillar v. *Cole Motor Car Co.*, 246 Fed., 831, 832.

See

Whitwell v. *Continental Tobacco Co.*, 125 Fed., 454 (C. C. A. 8th Circ.).

In re Green, 52 Fed., 104 (C. C. S. D. Ohio).

The validity, at least prior to the Clayton Act, of pattern agency contracts in substance identical with that involved in this case cannot be questioned. State courts of the highest repute have not hesitated to sanction the issue of injunctions restraining the local agent or dealer from selling the patterns of other manufacturers than the one to whom he was bound by contract.

Butterick Publishing Co. v. *Fisher*, 203 Mass., 122;

Standard Fashion Co. v. *Siegel Cooper Co.*, 30 App. Div., 564; 157 N. Y., 60; 44 App. Div., 121;

Butterick Publishing Co. v. *Rose*, 141 Wis., 533;

Peerless Pattern Co. v. *Gauntlett Dry Goods Co.*, 171 Mich., 158.

The validity of contracts of this character is shown by many other decisions collected in Davis' Trust Laws and Unfair Competition, (pp. 410 *et seq.*).

See

Brown v. *Rounsavell*, 78 Ill., 589;

Southern Fire Brick & Clay Co. v. *Garden City Sand Co.*, 223 Ill., 616;

Ferris v. *American Brewing Co.*, 155 Ind., 539;

J. W. Ripy & Co. v. *Art Wall Paper Mills*, 41 Okla., 20.

In the case last cited the Court said (p. 23):

"An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade.

"A contract between individuals, the main purpose and effect of which is to promote, advance, and increase the business of those making it, will not be held to be in restraint of trade and commerce merely because its operations might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce."

That pattern agency contracts like that in the case at bar have not been regarded by the courts as being *prima facie* in restraint of trade or competition is shown by the fact that they have been sustained many times as against attacks based on the anti-monopoly statutes of different States, some of which are most sweeping in their condemnation of any agreement tending toward monopoly.

Thus in *Butterick Publishing Co.* v. *Fisher*, 203 Mass., 122, it was held that the contract of the Butterick Company, which was substantially identical with the contract of the Standard Fashion Co. now before the court, was not illegal under the provisions of R. L., c. 56, s. 1, which is as follows:

"A person, firm, corporation or association of persons, doing business in this Commonwealth, shall not make it a condition of the sale of goods, wares or merchandise that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person, firm, corporation or association of persons;

> but the provisions of this section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of goods, wares or merchandise."

Pattern agency contracts have uniformly been sustained by the New York courts, notwithstanding the provisions of Laws of 1899, c. 690, s. 1, to the effect that:

> "Every contract, agreement, arrangement or combination, whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented is hereby declared to be against public policy, illegal and void."

Attention has already been directed to the words "is or may be" (*supra*, pp. 34 *et seq*).

With reference to the similar New York statute of earlier date (Laws of 1893, c. 716), Judge Ingraham, speaking for the court in *Walsh* v. *Dwight*, 40 App. Div., 513, said (p. 517):

> "This Act did not have the effect of preventing a manufacturer from fixing the price at which his articles should be sold, or from making an agreement with those persons who acted as the jobbers or retailers of his manufactured articles that they would deal exclusively in his merchandise, or would not sell the merchandise of other persons at a

less price than that for which his product was sold."

In *Peerless Pattern Co.* v. *Gauntlett Dry Goods Co.*, 171 Mich., 158, a case involving a covenant like the present, the contract was held not to violate the provisions of Act No. 329 of the Public Acts of 1905, the first two sections of which read as follows:

> SECT. 1. "All agreements and contracts by which any person, co--partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void."
>
> SECT. 2. "All combinations of persons co-partnerships or corporations made and entered into for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly of any trade, pursuit, avocation, profession or business, are hereby declared to be against public policy and illegal and void."

In *Weibolt* v. *Standard Fashion Co.*, 80 Ill. App., 67, it was held that a pattern agency contract of the Standard Fashion Co., precisely identical in the provision under consideration with the contract in the case at bar was not void as being in restraint of trade, either at common law or under the state statute relating to trusts and combinations, which makes unlawful any agreement to regulate or fix the price of any commodity or to fix or limit the amount or quantity to be sold in the State. (See Ill. Rev. Stats., sec. 269*a*.)

In *Sullivan* v. *Rime*, 35 S. Dak., 75, an action was brought to recover the price of patterns sold by plaintiff's assignor (the Home Pattern Co.) to the

defendants under an agency contract by which the defendants purchased the patterns and agreed not to offer for sale any other make of patterns. The case came up on demurrer and it was held that the demurrer was properly overruled. The Court said (p. 77):

> "The contention of appellants is that said contract, by reason of the provisions therein contained that defendants should not offer for sale any other make of patterns, is void and contrary to the provisions of c. 224, Laws of 1909, prohibiting monopolies. * * * There may be some serious question, considering the provisions of said contract as a whole, whether it is in fact an agency or a sales contract. But, as we view the case, it is not material to a determination whether it be held an agency or sales contract, as the result would be the same in either case. We are of the view that the provisions of said c. 224 have no application and were never intended to cover or include any of the questions here presented. The Home Pattern Company had the right to sell and to have sold its merchandise in this state, and had the right to procure an agent or purchaser to deal in and handle its patterns, obligated and bound by contract not to offer for sale or sell other like patterns for other parties. Whether treated as an agency or sales contract, there is nothing therein which, in the slightest degree, tends to the creation of a monopoly, or which in any manner tends to interfere with the right of any other persons to offer for sale or sell like merchandise of other makes in direct competition with the sales under the contract in question. So far as any provision of this contract is concerned, the whole world was theirs; the only limitation being that other persons handling similar patterns could not secure defendants as agents or purchasers during the continuance of the contract in question. The de-

fendants, if they purchased said merchandise outright, did not purchase the same as consumers thereof; but purchased the same for resale to consumers. Under such circumstances, we are of the view that the Home Pattern Company had the legal right to enter into a contract with defendants obligating them not to handle like patterns for other parties. There is no unlawful combination or monopolistic trust in such transaction, and this wholly regardless of whether or not such patterns were patented or copyrighted."

The same result has often been reached in cases involving similar contracts concerning other articles than patterns.

See, for example:

Walter A. Wood, etc., Co. v. *Greenwood Hardware Co.*, 75 S. C., 378;

Staroske v. *Pulitzer Publishing Co.*, 235 Mo., 67, *supra*;

W. T. Rawleigh Med. Co. v. *Osborne*, 177 Ia., 208;

Rose v. *Gordon*, 158 Wis., 414.

In the first of these cases the plaintiff sued for the price of certain mowers, rakes, etc., sold under a contract which provided that the defendant would not "accept the agency for, or sell, any other mower, hayrake," etc. "during the term of this contract." The defendant contended that the contract was invalid under the following statute (Code of Laws of South Carolina of 1902, Vol. 1, Sec. 2845):

"All arrangements, contracts, agreements, trusts or combinations between two or more persons as individuals, firms or corporations, made with a view to lessen, or which tend to lessen, full and free competition in the impor-

> tation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such product or article, and all arrangements, contracts, trusts, syndicates, associations or combinations between two or more persons as individuals, firms, corporations, syndicates or associations, that may lessen or affect in any manner the full and free competition in any tariff, rates, tolls, premiums or prices or seeks to control in any way or manner such tariff, rates, tolls, premiums or prices in any branch of trade, business or commerce, are hereby declared to be against public policy, unlawful and void."

The court held that the contract was valid, saying (p. 385):

> "It is one of those minor contracts in partial restraint of plaintiff's right to freely sell and the defendant's right to freely buy which the common law would hold to be reasonable as a fair protection of the mutual interests of the parties, and not injurious to the public as tending to create a monopoly. * * * It is the agreement of a single independent manufacturer and a single independent dealer and not monopolistic in its tendency. The contract leaves room for the keenest competition in that community by manufacturers and dealers of similar implements. There is nothing in the complaint to show that defendant is the sole dealer in that kind of implement in that community or that the needs of the public could not be reasonably met by other dealers in similar implements."

It will be noted that the South Carolina Statute, like the Clayton Act, invalidates a contract which

"tends" to lessen competition, and consequently the decision strongly supports the plaintiff's contention in the present case.

So, in *Rose* v. *Gordon*, 158 Wis., 414, which was a bill to enjoin a breach of a covenant in a lease to sell only the plaintiff's beer, the court held that there was no violation of Section 1747e of the Statutes of Wisconsin, which invalidates every contract "in restraint of trade or commerce" and every "attempt to monopolize any part of the trade or commerce in this state." The Court said (p. 416):

> "The restraint of trade resulting from the agreement being partial only and not operating to the prejudice of the public by unduly restricting competition, the contract is not an illegal contract in restraint of trade within the provisions of Sec. 1747e, Stats."

The foregoing decisions show the state of the law at the time of the passage of the Clayton Act. While Congress obviously intended to change the law by the enactment of Section 3, as is pointed out by Judge Anderson (p. 190), it did not intend to stamp with *prima facie* illegality contracts of this nature which had been regarded as harmless in the past, but merely to provide that they should be unlawful *if* they tended to substantially lessen competition or create a monopoly, and if the fact that they did have this tendency in any particular case were fairly proved by a preponderance of evidence.

XI.

Such decisions as have been made under Section 3 of the Clayton Act sustain the plaintiff's position.

Notwithstanding the great importance of Section 3 of the Clayton Act and the multitude of exclusive trade arrangements which must be now

in effect in this country, the cases under this section which have thus far been decided by the courts have been very few.

The only cases, at least in the Federal courts, in which the effect of Section 3 has been considered, apart from the case at bar, appear to be the following:

Sperry & Hutchinson Co. v. *Fenster*, 219 Fed., 755 (D. C. E. D. N. Y.);

Elliott Machine Co. v. *Center*, 227 Fed., 124 (D. C. W. D. Mich.);

United States v. *United Shoe Machinery Co.*, 227 Fed., 507; 234 Fed., 127; 264 Fed., 138 (D. C. E. D. Mo.);

Coca Cola C. v. *J. G. Butler & Sons*, 229 Fed., 224 (D. C. E. D. Ark.);

Motion Picture Patents Co. v. *Universal Film Mfg. Co.*, 235 Fed., 398 (C. C. A. 2nd Circ.);

Pictorial Review Co. v. *Curtis Publishing Co.*, 255 Fed., 206 (D. C. S. D. N. Y.).

Westinghouse Electric & Mfg. Co. v. *Diamond S. F., Co.*, 268 Fed., 121.

Although the section was quoted in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S., 502, 517, the court found it unnecessary to "make the application of this statute to the case at bar which the Circuit Court of Appeals made of it."

In *United States* v. *United Shoe Machinery Co., supra*, and in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co., supra* (when the latter was in the Circuit Court of Appeals), Section 3 was naturally held applicable to two of the alleged monopolies which the report of the judiciary committee upon the Clayton bill states were expressly aimed at by Section 3.

The United Shoe Machinery Co., case which in-

volves the interpretation and application of Section 3, is now pending before this Court. We therefore deem comment on it unnecessary.

In the Universal Film Mfg. Co., case, where a license agreement covering moving picture projecting machines provided that the licensee should use only films manufactured by the licensor, the Court said (p. 400):

> "The testimony shows that the complainant has a monopoly under its patents of projecting machines so that, if no films not manufactured by complainant can be used upon these machines, the complainant will obtain an absolute monopoly of the film business, in spite of the fact that its patent on films has expired. If the prohibitions of the Clayton Act mean anything at all, this case falls within them, and the restrictions as to use of films other than complainant's with the projecting machines are therefore void."

The facts appearing in these two cases being the only cases (other than the present case) in which contracts have been held invalid under Section 3 show that there is absolutely no resemblance between the situation which the courts had before them in those cases and the situation in the present case, where there is no evidence whatever tending to show that the last clause of the section is applicable.

In the Film case the court took occasion to refer expressly to a prior case in the Southern District of New York, where Section 3 was not regarded as applicable "because that case was decided upon a demurrer to a bill upon the face of which no substantial restraint of competition or monopoly in any line of commerce appeared," although the contract upon its face was similar to the contract condemned in the Film case.

The case hitherto decided which most resembles the present case is *Pictorial Review Co.* v. *Curtis Publishing Co., supra,* where Section 3 was held not applicable to the form of contract entered into between the Curtis Publishing Co., and its district agents, providing in substance, among other things, that the district agents should not supply to newsboys or dealers any periodical other than those published by the Curtis Publishing Co., without first obtaining the approval of the latter. Under the contract the district agents were *purchasers* of the Curtis periodicals. Judge Hand points out (p. 210) that the agents were much more than mere purchasers:

> "Looking behind the form of the contract which the defendant makes with its agents to the inherent features of the transaction I think it may be said that the selling arrangement more nearly resembles an agency conducted by district agents in co-operation with the Curtis boys than it does an outright sale to the district agents and nothing more. At any rate it has not been established with the clearness necessary to warrant the granting of a temporary injunction, that the defendant's contract referred to causes an unreasonable restraint of trade or otherwise comes within the prohibitions of the Clayton Act."

See also *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 224 Fed., 566 (C. D. S. D. N. Y., 227 Fed., 46, C. C. A., 2nd Circ.), a case under Section 2 of the Act; and *Ford Motor Co.* v. *Benj. E. Boone, Inc.*, 244 Fed., 335 (C. C. A. 9th Circ.), in which the validity of the Ford Co. uniform agency contract was sustained though without any reference to the Clayton Act.

XII.

The price maintenance clause of the contract is valid, but the question of its validity or invalidity is not material.

In the majority opinion of the Circuit Court of Appeals it is said (pp. 194-195):

> "To avoid possible misconception of this opinion, we add that we do not overlook that the contract in question also contains a stipulation to maintain resale prices. The validity of this provision is not raised by the pleadings, nor has it been discussed by counsel. Whether under the circumstances of this case such resale price stipulation is invalid, we do not decide."

The only evidence relating to this stipulation was the testimony of the plaintiff's president with reference to the reason for having this clause in the contracts:

He said (p. 39):

> "It has been a custom in the business ever since I have been connected with it to make contracts with the merchants, and as a matter of business we make them to cover a term of years, so that we won't have to be at the expense of sending agents around to them every year or two to get them to renew their contracts, and those contracts also renew themselves, to bring about what we consider a proper economic administration of the business. Now, a merchant signing that contract, as we see it, is entitled to expect to make a profit on the business during the time that he carries it on. If the merchant were threatened with competition from other merchants, in the neighboring town or in the neighboring

> square, perhaps, in the sale of the same patterns at prices other than those at which he himself is required to sell them, he could not do business at a profit; he could not compete with price-cutting in the next block or in the next community. Now, in undertaking to take a contract with us for a term of years, it is only ordinary prudence on his part to require that he be protected in securing from the public a fixed price; and we fix the price largely in view of those considerations."

No attempt is being made in the present case to enforce this clause, and it is immaterial whether it is valid or not.

It is submitted, however, that it is valid and that there is nothing in *Boston Store* v. *American Graphophone Co.*, 246 U. S., 8, or the earlier cases, to the contrary. In those cases the court was dealing with attempts on the part of manufacturers to control the prices at which their products should be sold by purchasers who had bought the goods from the manufacturers and had paid for them and acquired a complete title.

The present case is distinguishable on two grounds, first, because the plaintiff and defendant are jointly interested in the conduct of the business, and, secondly, because the defendant's title to the patterns was only a qualified one.

By the contract now before the court the plaintiff does not undertake to control the prices which members of the public may charge for its patterns, but only the prices which its local representatives shall charge. The local representative is not a purchaser of the patterns in the sense of having acquired complete indefeasible title. He has only a qualified title giving him the right to sell to others, but if he does not sell he must return the patterns to the plaintiff. The plaintiff has a re-

versionary interest until the sale of the patterns to the public and until such sale its interest is not divested. It has a right to protect this interest by requiring its agent to maintain retail prices, and there is nothing in the decisions inconsistent with the existence of this right.

In none of the price restriction cases cited by the Court below (p. 157) was the Court called upon to consider a contract under which the manufacturer retained any interest in the property or in which the sale was not an absolute one.

At the end of the majority opinion (p. 157), there are cited a number of authorities which it is suggested, have some bearing upon the question whether either the negative covenant or the resale price stipulation or both, if invalid taint the whole contract. None of these cases appears to have any relevancy to any issue in this case. They will be examined in Appendix B, section II (*infra*, p. 105).

XIII.

Although the time for an injunction has expired, the plaintiff is entitled to relief in equity.

This was conceded in the opinion of the majority of the Circuit Court of Appeals unless the contract were deemed to be invalid under the Clayton Act.

The right of a pattern manufacturer to an injunction restraining the local dealer from violating its agreement not to handle the patterns of other makers is thoroughly established.

Butterick Publishing Co. v. *Fisher*, 203 Mass., 122;

Standard Fashion Co. v. *Siegel Cooper Co.*, 157 N. Y., 60;
Butterick Publishing Co. v. *Rose*, 141 Wis., 533;
Peerless Pattern Co. v. *Gauntlett Dry Goods Co.*, 171 Mich., 158.

Judge Brown's criticism of *Lumley* v. *Wagner* (p. 199) is belated, as the doctrine that a court of equity will enjoin the breach of a negative covenant in a contract under proper circumstances, although it cannot specifically enforce the performance of the affirmative provisions, is now thoroughly settled in the law. It is as well settled in the Federal courts as anywhere.

Singer Machine Co. v. *Union Buttonhole Co.*, Fed. Cas. No. 12904 (C. C. Mass.).
Goddard v. *Wilde*, 17 Fed., 845 (C. C. R. I.);
Chicago & A. Ry. Co. v. *N. Y., L. E. & W. R. Co.*, 24 Fed., 516 (C. C. S. D. N. Y.);
Harrison v. *Glucose Sugar Refining Co.*, 116 Fed., 304 (C. C. A. 7th Circ.);
General Electric Co. v. *Westinghouse Elec. Co.*, 151 Fed., 664 (C. C. N. D. N. Y.);
Texas Co. v. *Central Fuel Oil Co.*, 194 Fed., 1, 22 (C. C. A. 8th Circ.);
Reece Folding Machine Co. v. *Earl & Wilson*, 205 Fed., 539 (D. C. N. D. N. Y.);
Montgomery Light Water & Power Co. v. *Montgomery Traction Co.*, 219 Fed., 963 (D. C. Ala.);
In re Consumers' Albany Brewing Co., 224 Fed., 235 (D. C. N. D. N. Y.);
Automobile Insurance Co. v. *Guaranty*

Securities Corp., 240 Fed., 222 (D. C. S. D. N. Y.).

In *Javierre* v. *Central Altagracia*, 217 U. S., 502, referred to by Judge Brown, the contract contained no negative covenant, and, in addition, there was an adequate remedy at law.

In the present case, during the pendency of the litigation, to wit, on Feb. 25, 1919, the plaintiff's right to an injunction expired by the termination of the contract period (Op. C. of A., p. 189). This did not, however, terminate the plaintiff's right to relief in equity by way of the assessment of damages and the Circuit Court of Appeals so ruled, citing as authority various decisions of this court (p. 189).

It is submitted that the decision of the Court of Appeals upon this point is correct, and that, notwithstandinging the fact that the plaintiff cannot have an injunction, it is entitled to have the validity of the contract determined and the case sent back for an assessment of such portion of its damages as it can prove.

Conclusion.

This court is not asked to reverse the decisions below on questions of fact arising upon conflicting evidence, for there were no such questions. The facts were not in dispute. The sole question was whether they showed that this contract fell within the prohibitions of section 3 of the Clayton Act, or whether on the other hand no violation of that section was shown. Assuming the contract to be one of sale, the question now is in its essence simply this: Is the last clause of the Clayton Act to be

given any effect, or are contracts containing a restrictive clause of the sort described to be condemned upon their face without reference to the surrounding circumstances?

We submit that the court below was in error in the whole theory of interpretation of the statute and its application, and that the decree of the Circuit Court of Appeals of the First Circuit should be reversed, and the case remanded with such directions as this Court may deem proper.

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APPENDIX. A.

HISTORY OF SECTION 3 OF THE CLAYTON ACT.

The history of the Clayton Act shows that the method of dealing with the evils aimed at was changed from a general condemnation of all contracts prohibiting dealing in the goods of a competitor to a provision making only those contracts invalid the effect of the condition in which may be to substantially lessen competition or tend to create a monopoly.

Considered broadly the scheme of legislation embodied in the original draft of Section 4 of the Clayton Bill, the subject matter of which is now found in Section 3, as enacted: (1) declared all lease and sales on the condition prescribed unlawful *per se;* (2) prevented the abuse of so-called "tying contracts" by prohibiting their use; (3) provided for the enforcement of its provisions through the courts; and (4) declared the act of making such leases or sales criminal and prescribed punishment therefor.

The Senate scheme, as originally recommended, and later withdrawn, was substantially the same, except for the elimination of the criminal feature, and the inclusion of "contracts for sale."

Each of these features was eliminated in the Act as finally adopted.

Section 3 as enacted(1) does not declare any lease, sale or contract for sale unlawful *per se;* (2) does not prohibit use to abolish abuse; (3) provides for the enforcement of its provisions by the Federal Trade Commission; (4) does not declare any lease, sale or contract for sale criminal; and

(5) makes the lawfulness or unlawfullness of a lease, sale of contract with the prescribed tying clause dependent upon the effect.

The abandonment was of the plan to cope with the evils, or the legislative scheme, and not of the object of the legislation. The Clayton bill as first reported was a consolidation of numerous measures intended to deal with trust and monopolies. During the debates some of its subject matter was incorporated in the Federal Trade Commission Act. The matter referred to in the Judiciary Committees reports as to Section 4 was included in that incorporated in the latter Act, except where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Nothing of that character appeared in the original drafts.

The Clayton Bill (House Bill No. 15,657) was reported by the Committee on the Judiciary in the House on May 6, 1914 (House Report No. 627, 63rd Cong., 2nd Sess., Cong. Rec., Vol. 51, Part 8, p. 8201.) This report is not printed in the Congressional Record. Section 4 of the bill so reported is printed as a footnote:.[1]

It was of this section of the proposed bill, and not of Section 3 as enacted, that the language quoted from the House Committee report in the opinion

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[1]Sec. 4.—"That any person engaged in commerce who shall lease or make a sale of goods, wares, merchandise, machinery, supplies, or other commodities for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or by both, in the discretion of the Court."

of Judge Anderson (Rec., pp. 154, 155) was used.

Even in this drastic form the report made it clear that the bill was not intended to apply to agencies, for the portion quoted by Judge Anderson (*id.*, pp. 154, 155) was preceded by the introduction (H. Rept., No. 627, pp. 10, 11), printed as a footnote.[2]

In the Report (pp. 10-13) the House Committee stated the evils, or supposed evils, which it was undertaking to declare criminal. It stated that the character of the practices sought to be interdicted were those of the United Shoe Machinery Company, the American Tobacco Company and the General Film Company.

There was no attempt, even in the most drastic form of the bill, to deal with agencies where the risk of sale was assumed primarily by the manufacturer, nor was it intended, as the quotation plainly shows, to affect any scheme of agency, whether one in which the agent paid for the goods or not, whereby the agent so-called had the privilege to return all unsold goods to the manufacturer, and under which the agent was obligated to return all unsold goods.

In the House Report it was said in favor of the bill (p. 7):

"Nothing essential has been disturbed, noth-

[2]"Section 4 of this bill has apparently been much misunderstood, and great confusion seems to have arisen in regard to its provisions. Whether designedly or from a misunderstanding of its purport, we know not, but it has been contended very earnestly that its provisions prevent exclusive or sole agencies. It not only does not prohibit or forbid exclusive agencies, but, on the contrary, it in no way whatever relates to agencies properly so termed. Let us, therefore, consider what this section really accomplishes. It prohibits the exclusive or 'tying' contract made between the manufacturer and the dealer by purchase or lease, whereby the latter agrees, as a condition of his contract, not to use or deal in the commodities of the competitor or rival of the seller or lessor."

> ing torn up by the roots, no parts rent asunder which can be left in wholesale combination. * * * The bill is not designed to destroy or hinder business, but, on the contrary, to help business and the whole people of the country who are related to or affected by it."

The House Report (p. 12) makes it plain that it only intended to prohibit tying contracts where the loss on sale falls on the dealer, for it says:

> "The customer having once gone to another dealer or procured the desired commodity through a mail order house may not return (the goods purchased) to his local dealer *and the goods purchased under an exclusive or 'tying' contract may remain on the shelves of the local merchant unsold.* The local dealer has invested his money in them; he has paid for them; they belong to him." (Italics ours.)

That language of course is not applicable to the contract in suit where, if the goods are unsold the defendant not alone may but is bound to return them to the manufacturer.

Accompanying the House Committee Report were three separate minority reports, marked respectively Part 2, Part 3 and Part 4, which opposed Section 4 as proposed on the ground, among others, that "it wipes out the long-established agency system of doing business."

The views expressed in the minority reports are of importance in assisting in reaching a proper interpretation of the Clayton Act, as enacted, because the objections to the bill reported by the majority as above expressed, so far as Section 4 was concerned, were all met in the amended scheme of legislation finally adopted, and the business practices described in the minority reports were not made unlawful unless their effect was substantially to lessen competition or tend to create a monoply.

Mr. Morgan, of Oklahoma, being of the opinion that Section 4 as proposed by the Committee did *not* affect selling agencies, proposed an amendment

by which selling agencies should be made unlawful by inserting the words "or appoint an agent to sell," so that the section as amended would read:

> "Sec. 4.—Any person engaged in commerce who shall make a sale or appoint an agent to sell goods, wares," etc., "shall be deemed guilty of a misdemeanor," etc. (Cong. Rec., 63rd Cong., 2nd Sess., Part 10, p. 9410).

This amendment was rejected (*id.*, p. 9411).

The importance of Mr. Morgan's proposed amendment is that the House rejected the proposal to make the bill definitely prohibit a contract by which any person should appoint an agent to sell goods, as distinguished from an agent selling the goods of a principal.

The bill was passed by the House with Section 4 as reported by the Committee, except that the word "agreement" had been inserted by amendment after the word "condition," so that the section would read, "On the condition, agreement or understanding," etc. That amendment was accepted by the Committee when suggested.

The bill (H. R. No. 15,657) then went to the Senate and was referred to the Senate Committee on the Judiciary, which, on July 22, 1914, reported the section to the Senate (Sen. Rept. No. 698, 63rd Cong., 2nd Sess., p. 56, Cong. Rec., 63rd Cong., 2nd Sess., Part 13, p. 12,469) in a different form.[6]

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[6]"Sec. 4.—That it shall be unlawful for any person engaged in commerce to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or, discount from, or rebate upon such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller."

And on the Section as thus reported the Senate Committee Report (p. 44) explained that the change was made because the Federal Trade Commission Act had been passed.[7]

Attention is here directed to the word "prohibition" used in the report, the significance of which will be hereinafter emphasized.

It was with respect to the entire legislative scheme reflected in the House bill as passed and the amendments proposed by the Committees, and not with respect to the special section now under consideration, that the Senate Committee used the language quoted by Judge Anderson on page 154 of the record. This was the same language as was relied on by Judge Johnson in the District Court (Rec., p. 15).

While the Senate Committee, in Report No. 698, recommended the amendment of Section 4 in the language quoted, when the bill was read in the Senate Mr. Culberson, the Chairman of the Committee, made the announcement that since the re-

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[7] "Sec. 4.—This section relates to exclusive and tying contracts. The first Senate amendment to the section changes the form of the declaration of substantive law by denouncing the acts as unlawful, instead of declaring, as in the House bill, that persons committing the acts shall be deemed guilty of misdemeanors, subject to the penalties prescribed. Following the course marked out in Section 2, and for the same reason, the penalties provided in Section 4 are stricken out and the enforcement of the section confided to the Federal Trade Commission by Section 9b. It is believed Section 4 is strengthened by the proposed Senate amendments to add 'contracts for sale' to leases and sales denounced by the House provision, and to make the prohibition applicable whether the articles leased, sold or contracted to be sold are 'patented or unpatented.'"

port had been printed, the Senate had passed the Federal Trade Commission act, which rendered unnecessary the adoption of Sections 2, 3 or 4 either in the form passed by the House or in the form recommended by the Senate Committee in the printed report, and that the committee, therefore, by vote resolved to recommend to the Senate that Sections 2, 3 and 4 of the bill be eliminated (*id.*, p. 13,849). The Senate accordingly rejected Section 4 in its entirety (*id.*, p. 13,849).

The rejection of Section 4 showed a complete change by the Senate Committee and the Senate itself of the method of dealing with the evils aimed at by Section 4 either in the form passed by the House or suggested by the Committee's proposed amendment.

The reason for the change, as stated by Mr. Culberson, was that the matters intended to be regulated by Section 4 could now be regulated more vigorously by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, which gave the Commission power to deal with all acts of unfair competition.

The fact that the Section had been abandoned, seem not to have been as fully weighed by the majority as by Judge Brown (Rec., p. 160).

There was no attempt on the part of the Senate to deal thereafter with any part of the subject matter of Section 4 in any way, until toward the end of the debate, when the attention of the Senate was called by Senator Reed to the decision of the Supreme Court in the case of Henry against A. B. Dick Company, and to the suggestion contained in the minority opinion of Chief Justice White, to the effect that the evil which the majority refused to correct might be obviated by legislation.

This suggestion prompted a motion to reconsider the rejection of Sections 2 and 4, and finally, after much discussion, resulted in the reconsideration of Section 4 (but not Section 2) and the adoption by the Senate of an amendment, in no way applicable to the contract in suit.[8]

Section 4, as proposed by the House and as proposed to be amended by the Senate Committee, also dealt with all classes of contracts described, and prescribed a complete *prohibition* of the condition that the purchaser shall not deal in the goods of a competitor. It did not deal with a limited *restriction* on the right of a purchaser to deal in such goods in a particular store, or with a *restriction upon the use of the purchaser's premises against handling goods of a competitor.*

This distinction between a prohibition and a restriction which falls short of such a prohibition, was fully appreciated by the Senate, which refused to adopt the amendment recommended by the Senate Committee, and instead adopted quite a

[8]"Sec. 4.—That it shall not be lawful to insert a condition in any contract relating to the sale or lease of or license to use any article or process protected by a patent or patents, the effect of which will be to prohibit or restrict the purchaser, lessee or licensee from using any article or class of articles, whether patented or not, or any patented process, supplied or owned by any person other than the sellor, lessor or licensor, or his nominees, or the effect of which will be to require the purchaser, lessee or licensee to acquire from the seller, lessor or licensor, or his nominees, any article or class of articles not protected by the patent; and any such condition shall be null and void as being in restraint of trade and contrary to public policy. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both, in the discretion of the Court." (Cong. Rec., 63rd Cong., 2nd Sess., Part 14, pp. 14,275, 14,276.)

different Section 4 which applied to *restrictions* as well as *prohibitions*.

So far as it may affect the case at bar, however, the important distinction to be observed is that the Senate rejected in its entirety the House scheme prohibiting leases or sales of unpatented articles upon the condition mentioned in Section 4 of the House Bill.

Again, so far as the inquiry may be material here, there was a complete abandonment of the original legislative scheme as outlined in the Committee reports.[9]

The bill was passed by the Senate (*id.*, Part 15, p. 14,610) and included the Section 4 as last given.

The House refused to concur in the Senate amendments and asked for a conference (*id.*, p. 14,737). The Senate agreed to the conference (*id.*, p. 14,718). The conference managers agreed upon a bill which was recommended in a report dated September 25th, 1914 (H. Rept. No. 1168, 63rd Cong., 2nd Sess., printed Cong Rec., Part 16, pp. 16,264-16,266).

In the interim between the reference of the Clayton Bill to the Conference Committee and the presentation of the report of the Conference Committee, Congress passed the Act to create a Federal Trade Commission (Act of September 26, 1914).

In conference Section 4 of the original bill was

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[9]Senator Walsh, who offered the amendment, said (*id.* p. 14,273):

> "When any article is not patented it is believed that practices of that character can easily be taken care of by the trade commission as unfair competition; but it is open to very serious question whether the trade commission will be able to put under the ban practices of that kind in view of the decision of the Supreme Court in the case referred to. This amendment is intended to prevent the making of contracts of that character, the idea being that the patentee is entitled to the exclusive use of his patent; but it ought not to be used to give him a monopoly of the sale of articles not patented."

entirely stricken out and the subject matter expressed in Section 4 was made Section 3, and finally agreed upon as follows:

> "Sec. 3.—It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" (Cong. Rec., 63rd Cong., 2nd Sess., Part 16, p. 16,267).

Of this radical change the House Conference Report (p. 11) said:

> "Amendment No. 4: This amendment strikes out Section 4 of the original House bill, providing against lease or sale upon condition, of goods, wares, etc., with condition, agreement or understanding that the lessee or purchaser shall not use or deal in the goods, etc., of a competitor and the penalty prescribed therein. It also strikes out Section 2 as proposed by the Senate, dealing with the same subject, and the following is agreed to in conference as a substitute therefor";

and then follows Section 3 as above (*id*, p. 16,267).

This indicates a complete abandonment on the part of the House of the scheme of legislation contemplated by Section 4.

Further illustrating the abandonment of the

original scheme of legislation and the adoption of another in its place, is the explanation made of Amendment No. 50,[10] in the Report (p. 15).

The Conference Report was first taken up in the Senate. Before the conferees had an opportunity to present their reasons for the radical departure from the bill as passed by the House or as amended by the Senate, Senator Reed took the floor in opposition to the Conference Report and the explanation of the radical change was brought out during the debate when Mr. Overman, one of the conferees, said (Cong. Rec., 63rd Cong., 2nd Sess., Part 16, p. 15,828):

> "It was a common agreement of the conferees since the establishment of the Federal Trade Commission that that [meaning Sections 2 and 4 of the original bill] ought to be left to the Federal Trade Commission."

Senator Walsh (*id.*, p. 15,828) said:

> "It is perfectly well known that those two sections went out of the Clayton Bill here because of the conviction that the conditions with which they dealt in Sections 2 and 4 were already provided for and taken care of by Section 5 of the Trade Commission Bill."

Senator Walsh (*id.*, p. 16,147) also said, in explaining the intent and scope of Section 3:

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[10]Amendment No. 50.—This amendment was a new section inserted by the Senate as Section 9, which was redrafted in conference and renumbered Section 11 to conform to other changes, and vests jurisdiction in the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission to enforce the provisions of Sections 2, 3, 7 and 8 of this act. This section also contains other provisions for the enforcement of this law" (*id.* p. 16,268).

Section 11 referred to is reported in full (*id.* p. 16,265) and on pages 4, 5 and 6 of the Conference Report.

> "But it is only in cases where competition is likely to be suppressed or a monopoly eventually result that we are in anywise concerned. It is for just such conditions that this legislation is intended."

Senator Reed was one of the strongest opponents of the bill as recommended by the Conference Committee. He strenuously charged that the Conferees had violated the instruction of both Houses of Congress, particularly as far as Section 3 was concerned (Cong. Rec., 63rd Cong. 2nd Sess, Vol. 16, p. 15, 827). During the course of the debate Senator Reed pointed out the difference between the original House and Senate drafts, and called attention to the fact that Section 3 was in effect something which neither House had agreed upon (*id.* p. 15, 830).

Senator Reed said:

> "The conferees added this language:
> 'Where the effect * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce.'
> "Before that amendment was put on it was enough to go into court and prove that a man had made a contract for the sale of an article, and in that contract specified that he should not use some other article. That was all you had to prove and the gates of the jail swung inward to receive the guilty man. But now, when you have proven the making of the contract, you have not made a case at all. You can be demurred out of court. You must go further and prove that the making of the contract may substantially lessen competition or tend to create a monopoly in that line of commerce.
> "Notice that the lessening of competition or tendency to create a monopoly in one section or city is not enough. The line of commerce

> taken as a whole must be substantially involved."

Senator Chilton, one of the conferees, answering Senator Reed (*id.*, p. 15, 997) said:

> "The United States Congress has the power, if it so desires to make it impossible for any corporation suspected of being a trust to do business, but it could not do so by a law that did not apply equally to all business, little as well as big."

and again (*id.*, p. 16,000):

> "The Senate in its wisdom decided that the Trade Commission should be the policy of the law makers. That has been settled. It was settled after one of the greatest debates ever heard on this floor."

and again (*id.*, p. 16,004):

> "The Senator knows that after the House and the Senate passed the bill the President signed a bill establishing an entirely different theory on these things and putting them into the hands of the Trade Commission."

Mr. Reed, after a lengthy debate in which he insisted that the conferees had failed in their duty, moved to recommit the bill to the conferees with instructions to restore the criminal penalties and make it conform in other respects with the original bill (*id.*, p. 16, 167), and the motion was rejected by a vote of 35 to 25 (*id.*, p. 16, 170).

In presenting the Conference Report to the House, Mr. Webb, the Chairman, said:

> "The House should consider this particular bill that we have under consideration now in connection with the Trade Commission bill and the Sherman anti-trust law, because we are

> trying to wedge in this bill and give it a place somewhere between those two measures. As you know, the Trade Commission bill was passed after this bill passed the House and before the trust bill passed the Senate" (*id.*, p. 16,273).

Mr. Floyd, also a member of the Conference Committee, pointed out that Section 4 was "stricken out entirely in the Senate" (*id.*, p. 16,317) and that the Federal Trade Commission was authorized to deal with the subject matter thereof (*id.*, p. 16,317).

The bill was finally passed in the form recommended by the Conference Committee by the Senate on October 5, 1914 (*id.*, p. 16,170), and by the House on October 8, 1914 (*id.*, p. 16,344).

It was radically different from the bill as originally proposed and discussed in the reports relied upon by the majority in the respects already noted. None of the changes were accepted until after lengthy debate, and a careful analysis of the effect of the changes.

The original House bill condemned *all* contracts of sale with "tying clauses," and made all such contracts unlawful *per se*. This was pointed out many times, notably by Senators Reed and Walsh (*id.*, pp. 15,827, 15,860, 16,116). The act as passed made such contracts unlawful only in the contingencies already noted.

The bill as passed made the unlawfulness of the contract depend upon its effect to be evidenced by a substantial lessening of competition or an actual, not potential, tendency to create a monopoly. It is not sufficient that the effect "*may be*" to lessen competition, but the lessening must be *substantial*. This was pointed out in the Senate at least thirty-six times notably by Senator Reed (pp. 15,830,

15,855, 15,856, 15,857, 15,860, 15,861, 16,045, 16,-148); by Senator Chilton (p. 16,602); by Senator Clapp (pp. 16,058, 16,059, 16,065); by Senator Sterling (pp. 16,105, 16,115, 16,116); by Senator Norris (pp. 16,047, 16,053); and by Senator Walsh (pp. 16,146, 16,148).

The unlawfulness of a contract was made to depend, not alone upon the substantial lessening of competition, but the substantial lessening must be in the line of commerce through the various states, and not in any specific place, section or community. This point was emphasized in the Senate over twenty-five times by Senator Reed (pp. 15,830, 15,587, 15,860, 15,861, 16,045, 16,057); by Senator Clapp (pp. 16,058, 16,-059); by Senator Sterling (p. 16,115); by Senator Norris (pp. 16,046, 16,047, 16,068), and by Senator Chilton (pp. 16,047, 16,048, 16,057).

In the House the same points were emphasized by Mr. Volstead (p. 16,282) and Mr. Nelson (p. 16,-324), and others.

It cannot, therefore, be said that the radical changes made in the bill were not fully understood by Congress.

The intent that the substantial lessening of competition and the tendency to create a monopoly shall apply to a "line of commerce," and not to a section or community, is shown in the fact that in Section 7, as enacted, the words used are "to restrain such commerce in any section or community." If the intent of Section 3 was to prevent substantial lessening of competition in any particular section or community, the conference committee were shown to have been competently equipped with verbiage with which to express that intent with exactness.

APPENDIX B.

Cases and text books cited on page 152 of the opinion.

Ford Motor Co. v. *Union Motor Sales Co.*, 244 Fed., 156. There was no question of agency at all in this case. The agreement was one of an absolute sale in which the risk of sale was borne entirely by the defendant. The Court therein said (p. 158):

> "* * * the case is absolute as distinguished from conditional sale not only within our decisions generally * * * but within the applicable decisions of the Supreme Court."

It will be observed that there is an intimation that if the sale had been a conditional one, instead of an absolute one, the ruling might not have applied.

Ford Motor Co. v. *Benjamin E. Boone, Inc.*, 244 Fed., 335. The opinion discussed one of the Ford uniform agency contracts in which an absolute sale of the motor cars was made to the agent and in which the agent agreed not to deal in any cars other than the Ford cars, and to sell the cars at prices fixed by the Ford Motor Company. The Court held that this was a reasonable agreement in furtherance of trade and not in restraint thereof, and in the protection of the interests of both the manufacturer and the agent.

The sections quoted from *Mechem on Agency* and *Mechem on Sales* do not in any way discuss such business arrangement as is involved in the present suit. Section 41 of the work on sales, cited by the Court, is one which distinguishes a

"contract for sale" from an "agency to buy" and holds that where there is an agency to buy the property so purchased is the property of the principal. Later, however, Mechem shows that there can be an agency to sell just as well as there can be an agency to buy. This excellent treatise of Mechem having been written prior to the time questions like those here arose, naturally does not deal with any such situation as arose in the *Willcox & Gibbs* case or as is presented by the case at bar.

The questions discussed in 2 *Corpus Juris*, 442 and 443, deal solely with the doctrine of *implied agency*, when based upon "Prior agency," "Single and Occasional Acts," "Subsequent Acts," "Dealings with Another Principal," "Acquiescence and Ratification," and "Silence and Knowledge"; and have not the slightest relevancy to any issue in the case at bar.

John H. Pray and Sons Co. v. *Appledore Land & Building Co.*, 76 N. H., 167. The defendant leased the Nunns Hotel Company (a third party) a hotel, and one of the covenants of the lease was that the Hotel Company should "put the hotel in suitable condition," etc. Later the defendant allowed the Hotel Company not exceeding $700 to enable it "to fulfill said covenant," etc. The plaintiff put the hotel in condition and sent its bill for same to the Hotel Company, which repudiated the claim. The plaintiff then sued the defendant. The Court gave judgment for the defendant on the ground that the agreement to allow the Hotel Company for the cost of the work, did not make the Hotel Company the defendant's agent.

Bendix v. *Staver Carriage Co.*, 174 Ill. App., 589, 595, was one in which the plaintiff brought an ac-

tion for damages for breach of a so-called "Agency Agreement," in which the risk of sale was wholly placed on the plaintiff. The question was presented on a motion to dismiss the complaint, upon various grounds, none material so far as the case at bar is concerned. The Municipal Court dismissed the complaint. One of the grounds for dismissal urged *by the defendant* was that the contract was not an "agency agreement" and was void because "it is a contract with an option" in violation of Section 130 of the Criminal Code. The Appellate Court dismissed that contention, but said in passing (pp. 594, 595):

> "We are disposed to agree with the contention that the contract does not create an agency. While it is true that it is entitled 'Agency Agreement,' and while it is also true that it *purports* to 'grant' to the plaintiff an exclusive right to sell defendant's motor cars in a specified territory for a specified period of time, *yet most, if not all, of the other provisions are wholly inconsistent with, and repugnant to, any theory of agency.*" (Italics ours.)

In *Wieboldt* v. *Standard Fashion Co.*, 80 Ill. App., 67, already considered, the same Court held that a contract exactly identical with the one in suit was an agency contract.

II.

Cases and rules cited by the Court below at page 157 as to whether one or both covenants, if invalid, "taint the whole contract" shown to answer the question in the negative.

The Court said (p. 157):

> "Whether the invalid negative covenant and the resale prices stipulation—either or both—taint the whole contract and all sales made in the course of the business contemplated by such contract, we do not decide."

The discussion of this question seems to us also to be immaterial, for obviously the contract in suit, whether one of absolute sale or otherwise, is not one in which under any decision cited or under the rules laid down in the text books the whole contract would be tainted, even if both stipulations were invalid.

In Massachusetts, where the contract was in part to be performed, an identical contract has been held to be valid in both respects under the Massachusetts Anti-Trust laws (*The Butterick Publishing Company* v. *Fisher*, 203 Mass, 122, *supra*).

That was a suit brought for an injunction to restrain the defendant from selling or permitting to be sold in his store any make of patterns other than Butterick Patterns during the term of the contract. The defendant demurred to the complaint upon the ground that the contract was contrary to R. L., c. 56, Section 1. The demurrer was overruled and the Supreme Judicial Court held that the contract was not invalid under the statute and issued an injunction.

Where there are other considerations in the contract, such as are present in the contract in suit, even if it were held that the negative covenant or retail price stipulation did constitute a violation of the Clayton Act, such invalidity would not taint the entire contract.

In *Parsons on Contract*, 9th Ed., page 490, the rule is laid down as follows:

> "But if one gives a good and valid consideration and another thereupon promises to do two things, one legal and the other illegal, he shall be held to do that which is legal, unless the two are so mingled and bound together that they cannot be separated; in which case the whole promise is void."

In *Pollock on Contracts*, 8th Ed., page 385; and *Wall's Pollock on Contracts*, page 484, the same rule is laid down.

In *Continental Wall Paper Co.* v. *Voight*, 212 U. S., 227, the plaintiff was a combination in restraint of trade composed of thirty manufacturers of wall paper, who controlled upwards of ninety-eight per cent. of all wall paper manufactured and sold in the several States and territories of the United States (p. 265). This Court held in substance that the fact that the plaintiff was an illegal combination in restraint of trade, would not affect the right of the plaintiff to recover for goods sold and delivered, unless the contract of sale itself was illegal.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S., 540, was a case where the sewer pipe company (the plaintiff below) was a member of an illegal combination in restraint of trade. The contract of sale, however, was not illegal and was not an essential part of the illegal combination, but was

wholly collateral thereto. This Court held that so long as the contract between the defendant and the combination was in itself a legal contract, the plaintiff had a right to recover.

Wilder v. *Corn Products Refining Co.*, 236 U. S., 165, was a similar case which was decided in favor of the plaintiff upon the authority of *Connolly v. Union Sewer Pipe Co.* (*supra*), and this Court held that a party cannot assert as a defense to a suit for money otherwise due under a contract, not inherently illegal, the fact that the party otherwise admittedly entitled to recover, is a member of an alleged combination under the Anti-trust Act.

In *McMullen* v. *Hoffman*, 174 U. S., 629, the plaintiff and the defendant entered into an agreement not to bid against each other for certain public work in the City of Portland, Maine, and to divide the profits upon the terms mentioned in the contract. This Court held that the whole contract was void and said (p. 670):

> "Being of the opinion that the contract proved in this case was illegal in the sense that it was fraudulent, and entered into for improper purposes, the law will leave the parties as it finds them."

Roselle v. *Beckemeir*, 134 Mo. 380, was another case in which there was no question of one illegal covenant invalidating another covenant which was legal. The case involved the disposition of certain money which had been collected in a lottery scheme, and the Court simply held that the right of the parties to the distribution of the money was not unlawful simply because the prior act of securing the money in the lottery was in itself unlawful.

Fishell v. *Gray*, 60 N. J. L. 5, was a case where the contract contained a negative covenant void as against public policy, but also other covenants which are not themselves illegal, and the Court held that "where there are several considerations, and one of them is an illegal promise to refrain from a particular business, the presence of such illegal stipulation will not illegalize the entire contract."

Rosenbaum v. *United States Credit Co.*, 65 N. J. L. 255, was a case which was parallel in facts with the last mentioned case, and in which the Court made the same decision relying on *Fishell* v. *Gray*.

Bone v. *Eklass*, 5 H. & N. 924, is a curious illustration of how courts endeavor to work out justice regardless of the illegality of provisions in a contract. The plaintiff sought to recover 426£. The defendant set up as an offset that he had advanced the plaintiff the sum of 500£ to be used by the plaintiff to bribe certain officials in the Turkish government, and alleged that the plaintiff had only used 300£ and still retained the balance of 200£. The Court held that although the transaction was a fraud on the Turkish government, and the agreement illegal, the plaintiff was not entitled to get the benefit of it, and that the defendant was entitled to offset the 200£.

Thomas v. *City of Richmond*, 12 Wall 349, was another case which involved no question of independent covenants. The State of Virginia had a statute which prohibited corporations from issuing corporation notes and prohibited its citizens from receiving the same. This Court held that inasmuch as the statute had prohibited the receiving of the notes as well as the making of them, the plaintiff was not entitled to recover.

Pullman Palace Company v. *Central Transportation Co.*, 171 U. S., 138 was based upon the ground that the lease made by the Central Transportation Co. was unlawful and void, because it was beyond the powers conferred on the company by the legislature and because it involved an abandonment by that company of its duty to the public. Notwithstanding that, however, the Pullman Company was required to account to the Central Transportation Company for the value of property delivered to it under the illegal contract.

Harriman v. *Nothern Securities Co.*, 197 U. S., 245, simply involved the question as to *how* a stockholder in the Northern Securities Company would be entitled to share in the distribution through the dissolution of the Northern Securities Company under a decree of this Court, as a monopoly.

In *Boylston* v. *O'Neil*, 121 N. E., 411, O'Neil was employed in the delivery of liquor contrary to law. A surety company had given a bond for the payment of money collected by him. The judgment was directed for the surety company upon the sole ground that since O'Neil's employment was illegal in itself, the violated bond for the performance of the illegal employment was in itself illegal, and since the plaintiff knew of the illegality as well as the defendant, the surety company could not be held liable.

None of these cases supports a claim that the entire contract is void, even if the negative covenant, and the covenant requiring the agent to sell at retail prices are illegal. Both of those provisions of the contract can be stricken out, and there still remains a substantial agreement between the parties which was violated without excuse, and for which the defendant makes no pretense to offer an excuse.